MISSISSIPPI LAW JOURNAL

SYMPOSIUM ON ETHICS

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SYMPOSIUM ON ETHICS

Foreword

In law, what place so tainted and corrupt
But being seasoned with a gracious voice
Obscures the show of Evil

William Shakespeare, *The Merchant of Venice*

As is illustrated by the above quotation, the concern with ethics in the legal profession is not a new phenomenon. Certainly, attorneys have been subjected to a higher level of ethical scrutiny than any other professionals in modern history. In fact, as long as there have been lawyers, people have been discussing the ethical considerations and shortcomings of the legal community. There are, however, several new developments in this area which are moving the ethical constraints and ideals inherent in the profession into the center of both the public and professional arenas.

The attorney's increased professional liability for ethical misconduct is the first of these developments. This heightened liability is abundantly clear both to the layman every day as he reads the local newspaper and to the attorney as he pays the premium on his errors and omissions policy. Recent years have also seen a dramatic increase in the concern for and regulation of attorneys' ethical conduct by the state bar associations. The bar associations of over forty states currently require bar applicants to take the Multi-State Professional Responsibility Exam

(MPRE), which tests familiarity with both the *Model Rules of Professional Conduct* and the *Model Code of Professional Responsibility.* Several of the states, including Mississippi, which require the MPRE also test knowledge of the ethics rules on their state bar exams. Law schools, as well, have begun to grapple with the need to imbue their students more effectively with the ethical considerations of the profession. Rather than simply relegating ethics to a two or three hour course, many schools are currently considering ways to incorporate ethical ideals into every aspect of the curriculum.

Mississippi, perhaps unlike many other states, has an opportunity to confront modern concerns about ethical problems before they become irrepressible. Kim Issac Eisler, an astute legal observer, has recently written:

> I didn't realize it at the time, but in observing the bar in a backward place like the Mississippi delta, I was seeing lawyers as they had been 100 years ago. They didn't try their cases in the newspaper; they honored their agreements, and they spent time representing clients rather than trying to enrich themselves. . . They were men of their community.[1]

For this reason, these recent developments in the field of legal ethics demand both attention and consideration. They therefore comprise the focus of this issue of *The Mississippi Law Journal.*

This symposium thus covers a wide range of topics in the field of legal ethics. It begins with an article written by Associate Professor Timothy Hall in which the author discusses the great importance of an attorney's drawing upon personal virtue and character in making ethical decisions and the effect of the law school experience upon such character. The second article, written by Professor William Champion, analyzes the *Mississippi Rules of Professional Conduct* which took effect in July of 1987 and replaced the more antiquated *Code of Professional Responsibility.* The final article, by John Corlew, addresses the issues of what it is that makes the practice of law worthwhile and the ways in which the profession is capable of responding to the challenges of change. The symposium is concluded by two student written works. The first probes the ethical regulation of contingent fee contracts in Mississippi and the second examines the effects of *Lowrey v. Will of Smith* in which the Mississippi Supreme Court held that when an attorney accepts a gift from a client and the presumption of undue influence is rased, the attorney, in order to overcome the presumption, must prove by clear and convincing evidence that he advised the client to seek independent advice and counsel before the gift was given.

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[1] K. Eisler, *Shark Tank* (1990) at xiv.

William T. Wilkins
Symposium Editor

MORAL CHARACTER, THE PRACTICE OF LAW, AND LEGAL EDUCATION

*Timothy L. Hall**

I. INTRODUCTION

Two broad topographies presently dominate the terrain of legal ethics. The first, what I will call ethics as professional regulation,[1] treats legal ethics as an inquiry centered about an analysis of ethical rules, both those created by professional organizations of lawyers[2] and those crafted by the courts.[3] The second, which we may refer to as philosophical reflection concerning ethics, attempts to evaluate specific ethical problems raised by the practice of law in light of the broader vocabulary and methodology of moral philosophy.[4]

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* Assistant Professor of Law, University of Mississippi Law School. J.D., 1983, University of Texas. An abbreviated form of this Article was originally presented as an address at the University of Mississippi Law School sponsored by the law school's chapter of the Christian Legal Society. Research for this article was made possible in part by a research grant from the Lamar Order of the University of Mississippi Law School. I wish to thank Monroe Freedman, George Cochran, and Ronald Rychlak for their helpful comments on an earlier draft of this Article and Dian Willhoite for her valuable research assistance.

[1] More than one commentator has argued that the legal profession's focus upon ethical rules is not really ethics at all, but something more like regulation. *See* Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 963 (1987); *see also* Sammons, *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. LEGAL ETHICS 609, 609 (1990) (law schools should "teach ethics and not just ethical regulation").

[2] *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1979)[hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT (1983)[hereinafter MODEL RULES]. For a discussion of the historical development of professional regulation leading to the Model Rules, see C. WOLFRAM, MODERN LEGAL ETHICS 53-65 (1986); Abel, *Why Does the ABA Promulgate Ethical Rules*?, 59 TEX. L. REV. 639, 639-41 (1981). The drive toward increased professional regulation has not only embraced attorneys but judges as well. *See* ABA CODE OF JUDICIAL CONDUCT (1990)(adopted by the ABA House of Delegates at its annual meeting in August 1990; replacing the 1972 Code of Judicial Conduct). This regulatory drive has also produced suggestions for rules to govern law professors, *see* McKay, *Ethical Standards for Law Teachers*, 25 ARK. L. REV. 44 (1971), and even law students, *see* Biernat, *Why Not Model Rules of Conduct for Law Students?*, 12 FLA. ST. U.L. REV. 781 (1985). In fact, the Executive Committee of the American Association of Law Schools adopted a Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities on November 17, 1989. *See* Association of American Law Schools: Association Handbook 53 (1991).

[3] For a discussion of the power of courts to regulate the legal profession, see C.

Ethics as professional regulation brings to a discussion of legal ethics the typical tools of legal analysis. Students trained to "think like lawyers" in the first year of law school bring that training to bear upon the texts that form the canons of professional ethics. They construe rules of professional conduct in a manner typical of that used to construe statutes generally and explore the legal principles enunciated in appellate opinions according to the style learned under tutelage of the Socratic method.[5] Textbooks emphasizing ethics as professional regulation bear a close resemblance to textbooks covering other subject matters in which judicial opinions, statutes, and a miscellany of secondary materials form the basis of an analysis of relevant legal principles.[6]

Philosophical reflection treats issues of legal ethics as a subspecies of ethics generally. Philosophical approaches to legal ethics have tended to emphasize the theoretical difficulties with adversarial ethics—that is, an ethics in which a lawyer as an advocate may or even should engage in conduct that would be unethical were the lawyer acting in an individual capacity.[7]

WOLFRAM, *supra* note 2, at 22-33.

[4] I should, of course, be more precise and speak of various *vocabularies* and *methodologies* of moral philosophy rather than suggest the existence of any monolithic approach to philosophical ethics. For a general commentary on the failure of modern philosphy to find a unified approach to ethical theory, see A. MACINTYRE, AFTER VIRTUE (2d ed. 1984).

[5] Judith Shklar has labeled as "legalism" the attitude "that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." *See* J. SHKLAR, LEGALISM 1 (rev. ed. 1986). It is a testimony to the general captivity of legal minds to a legalistic perspective that many lawyers may have difficulty perceiving any option to a rule-based ethical system. *See* Landwehr, *Lawyers as Social Progressives or Reactionaries: The Law and Order Cognitive Orientation of Lawyers*, 7 LAW & PSYCHOLOGY REV. 39 (1982).

[6] *See, e.g.*, S. GILLERS & N. DORSEN, REGULATION OF LAW AND ETHICS (2d ed. 1989).

[7] *See, e.g.*, Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1-15 (1975); Luban, *The Adversary System Excuse*, in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83-122 (D. Luban ed. 1983); Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980). For defenses of adversary ethics, see Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client*

Moral philosphers appear, in fact, to have had an impact upon the development of the *Model Rules of Professional Responsibility*, by prompting the drafters to allow lawyers to decline to undertake the pursuit of objectives or employ tactics to which the lawyers have conscientious objection.[8]

I am less concerned with defending this crude distinction between legal ethics in terms of professional regulation, on the one hand, and of philosophical reflection, on the other hand, than I am in demonstrating the similarities between these two approaches and their distance from a third way of thinking about moral conduct. Both ethics as professional regulation and philosophical reflection have in common at least three crucial elements. First, both approaches are largely intellectual enterprises, emphasizing ethics as the solution of moral problems and the articulation of reasons justifying the solution.[9] Second, both are atemporal: they treat ethics as a matter of discrete moral moments, severed from the past and remote from the future.[10] Finally, both assume that upon the correct solution of a moral problem, an attorney will act according to the perceived dictates of the solution.[11]

Relation, 86 Yale L.J. 573 (1977); Freedman, *Personal Responsibility in a Professional System*, 27 Cath. U.L. Rev. 191 (1978); Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities*, 1986 Am. B. Found. Res. J. 613. To a lesser extent moral philosophers have also examined issues relating to paternalism: whether and to what extent a lawyer may pursue objectives based on his or her own assessment of a client's best interests. *See, e.g.,* Wasserstrom, *supra*, at 15-22; Luban, *Paternalism and the Legal Profession*, 1981 Wis. L. Rev. 454.

[8] *See* Scheyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 Wis. L. Rev. 1529, 1530.

[9] The tendency of legal ethics to concentrate upon ethics as problem-solving represents a sub-category of "thinking like a lawyer" which focuses in general upon a perception of life as a series of problems to be solved. *See* Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 Va. L. Rev. 735, 739 (1978).

[10] For an example of an ethical approach that does not summon the language of character and virtue used in this Article, but which nevertheless suggests that ethical conduct occurs upon a temporal continuum, see Hazard, *Ethical Opportunity in the Practice of Law*, 27 San Diego L. Rev. 127, 138 (1990)(referring to lawyer's exercise of ethical judgment as "continuous interaction between present ethical opportunities and future ethical potential").

[11] The Model Rules declare that compliance with the Rules depends primarily upon "understanding and voluntary compliance," secondarily upon "inforcement by peer and public opinion," and only in the last event upon "enforcement through disciplinary proceedings." Model Rules, *supra* note 2, Scope. Although the various prescriptions em-

These two approaches, characterized as they are by an intellectual and atemporal view of ethics that must largely assume compliance with ethical mandates, are radically truncated. They neglect the emotional and volitional elements of ethical conduct and thus ignore much of what we generally understand to be entailed in moral action. There are, no doubt, situations in which the only requirement for moral conduct is the knowledge of what ought to be done or ought not to be done. But for many moral circumstances, bare ethical knowledge is not decisive for ethical conduct. The question is not what is right, but whether one will do the right known to be right. For this question, matters of volition and emotion are crucial topics.[12] Furthermore, both ethics as professional regulation and as philosophical reflection generally fail to attend to the relationship of past and future upon the moment of ethical decision and, therefore, sever ethical acts from the ground in which they grow.[13] Finally, both professional regulation and philosophical reflection about ethics suffer the further defect of a lack of comprehensiveness. As to the ethical rules that compose the primary source of professional regulation for lawyers, no attorney can expect to find in them detailed resolutions of every moral decision that may arise in the course of the practice of law. The *Model Rules*, in fact, specifically disavow any claim to comprehensiveness.[14] As to the case

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bodied in the canons of professional regulation are reinforced by the disciplinary arm of the organized bar, by almost every account, the bar's disciplinary power is so weak as to be essentially worthless as a guarantor of moral conduct. *See* Abel, *supra* note 2, at 648 ("Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another." (footnotes omitted)). *See also* Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 292 (1986); Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self Regulation?*, 1974 U. ILL. L. FORUM 193, 208-09; R. ABEL, AMERICAN LAWYERS 147-50 (1989).

[12] On the relationship between volition and character, see T. AQUINAS, TREATISE ON THE VIRTUES 19 (J. Oesterle trans. 1984)("The will needs to be inclined by a habit to a good determined by reason in order that action may follow more promptly").

[13] Virtue is a matter of becoming, through a continuum of time stretching from the past, through the present, and into the future. This is the substance of Aristotle's observation that "we become just by doing just acts, temperate by doing temperate acts, brave by doing brave acts." ARISTOTLE, NICOMACHEAN ETHICS 1103b, in THE BASIC WORKS OF ARISTOTLE 952 (R. McKeon ed. 1941).

[14] *See* MODEL RULES, *supra* note 2, Scope ("The Rules do not . . . exhaust the

of philosophical reflection about ethics, we commonly, and rightly, respond to moral impulses and perceive ourselves to be subject to moral obligations for which we have no ready philosophical justification.

In this article I argue that speaking of ethics in terms of character is a more promising vehicle for connecting the moral faculties and dispositions that students bring with them to law school with the practice of law in which they will engage upon their departure.[15] I do not propose that a discussion of character should replace an emphasis on professional regulation or the insights to be obtained from philosophical reflection, but that it is a crucial supplement to these currently dominant approaches to legal ethics. Speaking of ethics in terms of character has a serious weakness, however: In referring to character; it relies upon a word that is essentially meaningless to the modern ear. Nevertheless, I know of no other word that so readily describes a key aspect of moral conduct omitted from most discussions of legal ethics. The English word "character" transliterates a Greek word with the meaning of an engraving tool, or the mark engraved upon an object—for example, the stamp on a coin, like Lincoln's head on a penny.[16] Character, therefore, refers to those habits and inclinations stamped upon a person's identity,[17] to

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moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules"). To see ethical rules as incomplete is merely to recognize the general distance between our ability to formulate general principles and our ability, even with such principles, to resolve moral conflicts. *See* Postema, *supra* note 7, at 68.

[15] It is possible that at least some of the current emphasis on revitalizing a spirit of "professionalism" among lawyers is another way of speaking about character. *See* Braithwaite, *Hearts and Minds: Can Professionalism Be Taught?*, 76 A.B.A. J. 70, 70 (1990). For the emphasis on "professionalism," see, e.g., ABA Comm'n on Professionalism, ". . . *In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism: Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association*, 112 F.R.D. 243 (1986). On the Commission's Report, see Professor Ronald Rotunda's generally negative critique in Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987).

[16] 2 OXFORD ENGLISH DICTIONARY 280 (1933); H. LIDDELL & R. SCOTT, A GREEK-ENGLISH LEXICON 1977 (rev. ed. 1940).

[17] *See* ARISTOTLE, NICOMACHEAN ETHICS 1103b, *supra* note 13, at 953 (emphasis in original):

the moral faculties and dispositions engraved upon an individual in the form of virtues and vices.[18] It predicts the future on the basis of the past. It declares that a woman or a man who has repeatedly responded to moments of danger and personal risk with courage in the past, or to moments of need with generosity, will likely do so again in the future.[19] Character is the relation-

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> [B]y doing the acts that we do in our transactions with other men we become just or unjust, and by doing the acts that we do in the presence of danger, and being habituated to feel fear or confidence, we become brave or cowardly. The same is true of appetites and feelings of anger; some men become temperate and good-tempered, others self-indulgent and irascible, by behaving in one way or the other in the appropriate circumstances. Thus, in one word, states of character arise out of like activities. . . . It makes no small difference, then, whether we form habits of one kind or another from our very youth; it makes a very great difference, or rather *all* the difference.

See also Aquinas' treatment of moral habits in T. AQUINAS, *supra* note 12, at 1-56.

[18] Virtues and vices were for Aristotle "states of character." *See* ARISTOTLE, NICOMACHEAN ETHICS 1106a, *supra* note 13, at 957. The "ethics of virtue" has been revived in recent years, typically in Aristotelean garb, as a result of rising disillusionment with the two chief varieties of contemporary ethical theory: a Kantian emphasis upon ethics as the articulation of universally applicable moral principles and a consequentialist emphasis on ethics as a calculation of the effects of actions (of which various forms of utilitarianism are most common). *See* Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in ETHICAL THEORY: CHARACTER AND VIRTUE 32 (P. French, T. Uehling & H. Wettstein eds. 1988). For a general summary of commonly perceived differences between ethical theories focused upon moral acts and those focused on certain qualities of persons, see Schmeewind, *The Misfortunes of Virtue*, 101 ETHICS 42, 42-44 (1990). Aristotle's theory of virtue is developed in NICOMACHEAN ETHICS, *supra* note 13. For Kant's basic moral theory, see I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck trans. 1959). *See also* I. KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE (J. Ellington trans. 1964). On consequentialism generally, see M. SLOTE, COMMON-SENSE MORALITY: CONSEQUENTIALISM (1985). The literature concerning utilitarianism is vast, but the basic issues may be surveyed in UTILITARIANISM: FOR AND AGAINST (J. Smart & B. Williams eds. 1973). For general studies concerning virtue, see, e.g., H. VON WRIGHT, THE VARIETIES OF GOODNESS (1963); P. GEACH, THE VIRTUES (1977); P. FOOT, *Virtues and Vices*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1 (1978); J. WALLACE, VIRTUES AND VICES (1978); M. SLOTE, GOODS AND VIRTUES (1983); ETHICAL THEORY: CHARACTER AND VIRTUE, *supra*.

[19] *See* A. MACINTYRE, *supra* note 4, at 38 ("[A] man's character is nothing other than his set of dispositions to behave systematically in one way rather than another, to lead one particular kind of life."). Character, then, is for its possessor something like the grandfathers in the poem by Stephen Crane.

> Once I saw mountains angry,
> And ranged in battle-front.
> Against them stood a little man;
> Aye, he was no bigger than my finger.
> I laughed, and spoke to one near me,

ship "between what a person is and what he seems to have decided to do."[20]

By attending to character we affirm the reality that ethical acts do not spring into existence like foam-risen Aphrodite sprang from the sea.[21] They do not typically arise out of the mere intellectual contemplation of rules. Rather, ethical acts are born out of the habits and inclinations of character. A man becomes brave, Aristotle asserted, by doing brave deeds.[22] A woman becomes just by piling one act of justice upon another, and then another, until a pattern of just acts stamps her life with the character of justice. Character, then, is a matter of becoming and to be spoken of requires attention to the movement of life through time. By understanding ethics in terms of character, we thus recognize the importance of history and time for ethical conduct. A discussion of character attends not so much to isolated moments of moral decision and action as it does to the cumulative effect of many such moments. It investigates the "time-full" self, as H. Richard Niebuhr referred to it.[23]

My argument will have two principal elements. It will in the first place attempt to explore the place within the legal profession of the classical virtues as embodied in the character of individuals. This exploration will conclude that the virtues are crucial to the effective practice of law and that they are important limits upon adversarial zeal, functioning as a limitation that rules of professional conduct cannot replace. My argument will

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"Will he prevail?"
"Surely," replied this other;
"His grandfathers beat them many times."
Then did I see much virtue in grandfathers,—
At least, for the little man
Who stood against the mountains.

Crane, *The Black Riders and Other Lines*, in STEPHEN CRANE: PROSE AND POETRY 1306 (Library of America ed. 1984). Character predicts that the present moral conflict will be resolved consistent with the outcomes of past conflicts of a similar nature.

[20] T. SHAFFER, FAITH AND THE PROFESSIONS 7 (1987). Although we typically speak of a man or woman of character as having disposition to act virtuously, there is nothing inherent in the notion that would limit character to descriptions of disposition to virtue. To lie persistently is to demonstrate a certain character as well.

[21] *See* E. HAMILTON, MYTHOLOGY 33 (1942).

[22] *See supra*, note 13.

[23] H. R. NIEBUHR, THE RESPONSIBLE SELF 90 (1963).

in the second place consider the impact of law school upon character and conclude that the language of character deserves a place in contemporary legal education.

Since virtue and character have to do with what a person *is*, and not just what decisions a person makes about ethical problems, to talk about character one must talk not just about ethical dilemmas but about people, about their lives and their histories. I will return to this point later in the essay;[24] but the validity of my assertion rests in part upon an illustration of what it means to talk about a person possessing an upright character. Since I desire to talk about legal ethics, I need a lawyer for a subject: one for whom a narrative of life is available. For this purpose, I propose to talk about the fictional lawyer hero created by Harper Lee in *To Kill a Mockingbird.*[25]

II. THE CHARACTER OF ATTICUS FINCH

To Kill a Mocking Bird is about a lawyer named Atticus Finch who practiced law in a town called Maycomb, Alabama during the 1930s. The climax of the book, at least for most lawyers and would-be lawyers, is the trial of a black man named Tom Robinson, who is falsely accused of raping a white woman. Atticus Finch represents Robinson, and even though his client is ultimately convicted of capital rape, the trial does not conclude before Atticus speaks the unspeakable truth to the jury and all the town spectators. He says what no one wants to hear: that the alleged victim, Mayella Ewell, was not raped. That she, in fact, committed the socially unforgivable sin of attempting to seduce a black man, and only cried rape after he rebuffed that attempt.

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[24] *See supra*, text accompanying notes 114 to 124.

[25] H. LEE, TO KILL A MOCKINGBIRD (1966)[specific references to the novel are hereafter indicated by page numbers without further citation]. For useful criticisms of the novel, see Erisman, *The Romantic Regionalism of Harper Lee*, 26 ALA. REV. 122 (1973); Dave, *"To Kill a Mockingbird": Harper Lee's Tragic Vision*, in INDIAN STUDIES IN AMERICAN FICTION 311-23 (M. Naik, S. Desai & S. Mokashi-Punekar eds. 1974); W. Going, *Store and Mockingbird: Two Pulitzer Prize Novels about Alabama*, in ESSAYS ON ALABAMA LITERATURE 9-31 (1975). For a primarily negative criticism of the novel, see W. STUCKEY, THE PULITZER PRIZE NOVELS: A CRITICAL BACKWARD LOOK 193-97 (1966). The screen adaptation of the book, starring Gregory Peck, has been rated among the most outstanding trial movies. *See* Verrone, *The Twelve Best Trial Movies*, 75 A.B.A. J. 96 (1989). I find it impossible to speak of Atticus Finch without acknowledging my debt to Professor Thomas Shaffer's discussion of *To Kill a Mockingbird* in Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981). *See also* T. SHAFFER, FAITH AND THE PROFESSIONS, *supra* note 20, at 5-38, 67, 76, 83-84, 92, 98. In general, I owe a substantial debt to the emphasis upon character and virtue in Professor Shaffer's work. In addition to the previous works cited, see generally T. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); T. SHAFFER, AMERICAN LEGAL ETHICS (1985).

Lawyer-readers revel in the trial narrative: Atticus' cross-examination of Mayella Ewell and her father, his closing argument that spells out the truth. And they lean forward to hear him almost whisper to the jury at the end: "In the name of God, do your duty." But much of the rest of the book seems irrelevant to the professional concerns of lawyers. Legal readers are interested in Atticus the lawyer, but at the hands of the book's author, Atticus keeps spilling out of his lawyerly garb. Before he ever stands to his feet to defend Tom Robinson in a sweltering Alabama summer, we see him as a father, and a neighbor, and a church member. We want a lawyer-hero, and by the time the book is over we have one in Atticus' defense of Robinson. However, Harper Lee gives us something more than just a lawyer hero. The heroism of Atticus Finch is not one that springs full grown out of the trial of Tom Robinson: it is nurtured in a thousand hot Alabama days, among the children with whom he dwells and the neighbors before whom he lives his life. And we discover that Atticus the hero lawyer is cut out of the same cloth as Atticus the father, or the neighbor, or the Christian. He acts, but his actions bear the stamp of his character. Even when he acts heroically, we are not greatly surprised or astounded that he should do so, because we know who he is. We say to ourselves, "What else would Atticus do?" He confronts ethical problems, but his resolution of them is not made by reference to any code or rule of professional conduct but by recalling what kind of man he is and by asking how his contemplated actions will affect the man he wants to be.

To Kill a Mockingbird thus meanders its way across nearly a hundred pages before we ever hear about the trial of Tom Robinson for capital rape. In the course of those pages, we begin to discover that Atticus is what our grandparents would have called a man of character. He is, for example, uncommonly devoted to telling the truth.[26] His daughter Scout could expect the truth from Atticus whether the topic was the definition of a compromise ("an agreement reached by mutual concessions") or a rape ("carnal knowledge of a female by force and without consent").[27] And Atticus scolded his brother for dodging Scout's query of what a "whore-lady" was. "Jack! When a child asks you something, answer him, for goodness' sake. But don't make a production of it. Children are children, but they can spot an evasion quicker than adults, and evasion simply muddles them."[28]

Atticus was also a compassionate man and was able to place himself in the shoes of others and feel and see from their perspective.[29] He explained this virtue to Scout as a practical way of getting along with other people. "[I]f you can learn a simple trick, Scout, you'll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it."[30] Atticus practiced this simple "trick" constantly. By it he felt compassion towards the family of a man who spent all his welfare money on whiskey and shot game out of season to feed his children. "It's against the law, all right," Atticus told Scout, "and it's certainly bad, but when a man spends his relief checks on green whiskey his children have a way of crying from hunger pains. I don't know of any landowner around here who begrudges those children any game their father can hit."[31] The ability to climb into someone else's skin also enabled Atticus to demonstrate patience and respect toward an elderly woman, Mrs. Dubose, who was perennially cross and who burdened Atticus' children with constant racist abuse once Atticus had undertaken the representation of Tom Robinson. After her death Atticus explained to his children that a doctor years previously had prescribed morphine to ease Mrs. Dubose's pain and that she had been an addict to the drug for a long time. Shortly before her death, however, she had set herself to break the addiction and had in fact done so. She was, Atticus said, "a great lady." Atticus' son, Jem, was incredulous.

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[26] *See generally* Shaffer, *supra* note 25.

[27] Pp. 38, 145.

[28] P. 96.

[29] It might be more accurate to speak of this virtue as that of "amiability." *See* A. MACINTYRE, *supra* note 4, at 241 (discussing importance of virtue of amiability in works of Jane Austin and describing it as requiring "a genuine loving regard for other people as such, and not only the impression of such regard embodied in manners").

[30] P. 36.

[31] P. 37.

> "A lady?" Jem raised his head. His face was scarlet. "After all those things she said about you, a lady?"
>
> "She was. She had her own views about things, a lot different from mine, maybe . . . . son, I told you that if you hadn't lost your head I'd have made you go read to her. I wanted you to see something about her—I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do. Mrs. Dubose won, all ninety-eight pounds of her. According to her views, she died beholden to nothing and nobody. She was the bravest person I ever knew."[32]

When a judge appointed Atticus to represent Tom Robinson, he illustrated traits of character that have already been established by the preceding narrative of *To Kill a Mockingbird.* For example, Atticus ultimately explained his role as Tom Robinson's attorney in terms of truth-telling. When warned by a friend, Link Deas, that he had everything to lose by defending Robinson, Atticus grounded his determination to go forward on the necessity of telling the truth. "Link, that boy might go to the chair, but he's not going till the truth's told. . . . And you know what the truth is."[33] Protecting the reputation of the alleged rape victim was not an objective sufficient to justify hiding the truth when a man's life was at stake. Atticus declared that he was "in favor of southern womanhood as much as anybody, but not for preserving polite fiction at the expense of human life."[34] Thus, in the summer of 1935, Atticus Finch told the truth on behalf of a black man in Alabama even though he had everything to lose from doing so. He told the truth because truthfulness was stamped upon his character like an Indian head on an old nickel, because on countless prior occasions his tongue had learned to tell the difference between lying syllables and truthful syllables and had acquired a taste for the latter. "In ordinary truth telling Atticus trained himself for momentous truth telling."[35]

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[32] P. 121.

[33] P. 156.

[34] P. 158.

Atticus' ability and disposition to walk in the shoes of others did not disappear once he undertook the defense of Tom Robinson. Even when his appointment to defend Robinson had made Atticus and his family the constant butt of racial slurs, he refused to renounce the deep ties that bound him and the people of Maycomb County together. "This time we aren't fighting the Yankees," he told his children, "we're fighting our friends. But remember this, no matter how bitter things get, they're still our friends and this is still our home."[36] On the eve of the trial, when a mob of rural citizens attempted to lynch Tom Robinson and Atticus faced the mob, which was ultimately dispelled through the unexpected appearance of Atticus' children, Atticus retained his capacity for standing in someone else's shoes. After the crisis was over, he declared that the leader of the mob was "basically a good man . . . he just [had] his blind spots along with the rest of us."[37]

Even Atticus' heroic representation of Tom Robinson was for Atticus less a matter of what he would do than of who he was. The townspeople expected Atticus to present merely a token defense of Tom Robinson. They did not begrudge so much his representation of Robinson—after all, the presiding judge in the case had appointed Atticus, he had not volunteered. They did not, however, expect Atticus to represent Robinson zealously.[38] Atticus frustrated these expectations because he viewed the zealous representation of Robinson as involving who he was, who he wanted to be, and who he would be perceived to be by his children and his neighbors. He explained as much to Scout on more than one occasion:

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[35] Shaffer, *supra* note 25, at 190. *See* R. EMERSON, *Heroism*, in RALPH WALDO EMERSON 371 (Liberty of America ed. 1983)("The unremitting retention of simple and high sentiments in obscure duties is hardening the character to that temper which will work with honor, if need by, in the tumult, or on the scaffold.").

[36] P. 84.

[37] P. 168.

[38] On one occasion Scout overheard anonymous voices discussing Atticus' representation.

> "Lemme tell you somethin' now, Billy," a third said, "you know the court appointed him to defend this nigger."

> "Scout, you aren't old enough to understand some things yet, but there's been some high talk around town to the effect that I shouldn't do much about defending this man. . . . [I]f I didn't [represent Robinson] I couldn't hold up my head in town, I couldn't represent this county in the legislature, I couldn't even tell you or Jem not to do something again."
>
> "You mean if you didn't defend that man, Jem and me wouldn't have to mind you any more?"
>
> "That's about right."
>
> "Why?"
>
> "Because I could never ask you to mind me again."
>
> * * *
>
> "This case, Tom Robinson's case, is something that goes to the essence of a man's conscience—Scout, I couldn't go to church and worship God if I didn't try to help that man."
>
> "Atticus, you must be wrong. . . ."
>
> "How's that?"
>
> "Well, most folks seem to think they're right and you're wrong. . . ."
>
> "They're certainly entitled to think that, and they're entitled to full respect for their opinions," said Atticus, "but before I can live with other folks I've got to live with myself. The one thing that doesn't abide by majority rule is a person's conscience."[39]

For Atticus, then, moral conduct was a matter of personal identity. His principal resource for ethical action was not a rule or a professional code but a certain vision of himself. He acted as though the circumstances surrounding Tom Robinson's indictment and trial were a chisle in the hands of a sculptor, and

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"Yeah, but Atticus aims to defend him. That's what I don't like about it." P. 174.

[39] Pp. 83, 113. Atticus admitted to another friend that he had hoped to get through life without ever having to take on a case like Robinson's, but that once he had been appointed to represent Tom Robinson he had no choice. "[D]o you think I could face my children otherwise?" he asked. P. 97.

that he was the artist's subject. Nor was Atticus alone in viewing the ethical demands created by the Robinson trial as implicating who he was. When a neighbor, Miss Maudie, reflected on the matter, she observed: "We're the safest folks in the world. We're so rarely called on to be Christians, but when we are we've got men like Atticus to go for us. . . . Whether Maycomb knows it or not, we're paying the highest tribute we can pay a man. We trust him to do right. It's that simple."[40]

III. CHARACTER AND THE PRACTICE OF LAW

From one perspective, *To Kill a Mockingbird* does not present a narrative from which one may observe the effect of character upon the practice of law because Atticus Finch is never called upon to face the more perplexing ethical problems of law practice. He represents what appears to be an innocent client whose objective, an acquittal, is clearly meritorious.[41] Thus, he does not have to wrestle with the problem of how a person of upright character can undertake zealous advocacy on behalf of an unjust cause.[42] His client, Tom Robinson, appears to be telling the truth when he testifies, and consequently Atticus does not have to choose between protecting the confidences of his client and protecting the court from the admission of materially false evidence.[43] The principal witnesses for the prosecution are apparently lying on the witness stand, and Atticus never has to ponder whether and to what degree he should cross-examine a truthful witness.[44] We never see him involved in negotiations with other attorneys and thus never discover the extent to which Atticus would be willing to use deception to gain a negotiating advantage.[45] Finally, Atticus' dealings with clients are not presented to us, and consequently we have no basis for observing whether he padded legal bills to clients, deceived potential clients about his expertise in particular areas of practice, or lied to cover up either mistakes in or untimely performance of legal services.[46]

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[40] Pp. 228, 249.

[41] In this respect Atticus is like another great lawyer hero of fiction, Perry Mason, who over the years "managed never to defend a guilty client." *See* Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 384 n.21 (1987).

[42] See, for example, Charles Fried's attempt to provide a justification for this undertaking in Fried, *supra* note 7.

[43] Model Rule 3.3(a)(4) prohibits an attorney from offering material evidence that the attorney knows to be false, and imposes a duty upon the lawyer of taking reasonable remedial measures upon discovery that the attorney has in fact offered such evidence. The comments to Rule 3.3 indicate that "reasonable remedial measures" include remonstrating with the client, withdrawing from representation (in those cases in which withdrawal will "remedy the situation"), or disclosing the matter to the court. Rule 3.3(a)(2) prohibits the attorney from failing to make a disclosure to the court when such a disclosure is necessary to avoid "assisting in fraudulent or criminal activity." ABA Opinion 353 (1987), has construed this provision to require disclosure to the court when the attorney discovers that a client has committed perjury. *See generally* Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977).

Nevertheless, one can still observe from *To Kill a Mockingbird* that Atticus' character influenced his service as Tom Robinson's lawyer in at least two respects. In the first place, his character was a resource for effective advocacy. For example, his disposition to tell the truth and to press forward even in the face of adversity (the character traits of truthfulness and fortitude) made him a more zealous advocate for Robinson than he might otherwise have been. In the second place, Atticus' character made him a different kind of advocate than he might otherwise have been by imposing upon his practice character-based limitations to lawyerly zeal.

A. *Character and Effective Advocacy*

Atticus' character was a reservoir of moral faculties and dispositions crucial to his service as an advocate for Tom Robinson. He possessed the virtue of justice, the habit of justice,[47] according to which he possessed both the faculty to see that Tom Robinson was entitled to a vigorous defense and the disposition to provide such a defense.[48] Because of his character Atticus did not suffer from what he called "Maycomb's usual disease," the racist insanity that made reasonable people "go stark raving mad when anything involving a Negro comes up."[49] He was one of a handful of people in Maycomb who believed that "fair play is not marked White Only" and that "a fair trial is for everybody, not just us."[50] Moreoever, Atticus had, as we have seen, a disposition to tell the truth, and this disposition made it unlikely that he would mount a sham defense without challenging the testimony of Mayella Ewell and her father. He also possessed the virtue of courage, which enabled him to undertake an unpopular representation that posed great risks to himself, his children, and his practice.[51] His courage prompted him to take up vigil outside the jail on the night before trial and to oppose unarmed a group of men set on lynching Robinson. Finally, the character trait of fortitude caused Atticus to press forward with the defense of Robinson even though he faced overwhelming odds against an acquittal.

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[44] *See* United States v. Wade, 388 U.S. 218, 258 (1967)(White, J., concurring in part and dissenting in part)("more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth").

[45] *See* White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RES. J. 926 (1980); Dahl, *Ethic on the Table: Stretching the Truth in Negotiations*, 8 REV. OF LITIGATION 173 (1983); Hazard, *The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties*, 33 S.C.L. REV. 181 (1981).

[46] *See* Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 665 (1990)(discussing common forms of deception practiced by attorneys upon their clients).

[47] *See* T. AQUINAS, *supra* note 12, at 19 ("Justice is a habit").

Atticus also possessed certain technical legal skills that made him a good advocate. For example, Francis Wellman would have probably commended his cross-examination technique.[52] But in the hands of a lawyer of a different character than Atticus Finch, technical legal skills might never have been used to serve the client. A lawyer less just than Atticus might never have recognized that Tom Robinson was entitled to a vigorous defense and, consequently, would not have been disposed to provide him such a defense. A lawyer less courageous might have ignored the rumor that men from Old Sarum intended to lynch Robinson, might have stayed home the night before the trial preparing a brilliant opening statement, and might have arrived at the courthouse the next day to discover that his client's stiff body was still hanging from a tree on the edge of town.[53]

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[48] For a discussion of justice as a virtue of individuals, see generally O'Connor, *Aristotelian Justice as a Personal Virtue*, in ETHICAL THEORY: CHARACTER AND VIRTUE, *supra* note 18, at 417.

[49] P. 97. "Maycomb's usual disease," on the other hand, was itself a matter of character. It was a vice that had embedded itself in the character of most Maycomb residents, the vicious ability to look at a black man and not see a person, to judge all men of a different race of the most heinous crimes by the simple fact of their color. "Atticus had used every tool available to free men to save Tom Robinson," Scout mused after the trial, "but in the courts of men's hearts Atticus had no case. Tom was a dead man the minute Mayella Ewell opened her mouth." P. 254.

[50] Pp. 249-50.

[51] A hero does what everyone else knows is right but is afraid to do. Atticus thus became a hero for lawyers in this sense when he undertook a real defense of Tom Robinson in spite of Maycomb County's opposition to the truth being told. In this respect he met Emerson's criteria for a hero. "Neither defying nor dreading the thunder, [he took] both reputation and life in his hand, and, with perfect urbanity dare[d] the gibbet and the mob by the absolute truth of his speech, and the rectitude of his behavior." R. EMERSON, *Heroism*, *supra* note 35, at 373-74. Atticus achieved no sudden moral insight about the representation that is denied to us. Rather, he perceived the right as we perceive it. Nevertheless, we call him a hero because he did what we fear we would not do.

The central ethical issue in *To Kill a Mockingbird*, then, whether and to what extent Atticus would zealously represent Tom Robinson, was a problem of will and emotion rather than of intellect. It was the kind of ethical issue that regularly inhabits the real world of lawyers but which would make an uninteresting question on a legal ethics exam.

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[52] *See* F. WELLMAN, THE ART OF CROSS EXAMINATION (rev. ed. 1904).

[53] I know of no professional rule that would have required Atticus to risk his life to protect the physical well-being of his client by mounting a pre-trial vigil in front of the Maycomb County jail. Atticus' conduct at this point illustrates a common feature of his service to clients—it was broader than that of the traditional lawyer's role. On the night before trial, Atticus donned the garb of body-guard for his client. Later, after Robinson, convicted of capital rape, was killed while trying to escape from prison, Atticus became a compassionate messenger bearing the tragic news in person to Robinson's wife. Pp. 252-53. The description in *To Kill a Mockingbird* of his arrival at Robinson's home, and his response to a child there, captures as well as any passage in the book one of the aspects of Atticus' character.

> A little girl came to the cabin door and stood looking at Atticus. . . . [H]er hair was a wad of tiny stiff pigtails, each ending in a bright bow. She grinned from ear to ear and walked toward our father, but she was too small to navigate the steps. . . . Atticus went to her, took off his hat, and offered her his finger. She grabbed it and he eased her down the steps. Then he gave her to Calpurnia.

P. 253. Atticus assisted another client, Mrs. Dubose, in her desire to break an addiction to morphine by sending his son to read to her every afternoon. Pp. 114-21. Atticus, thus, rejected a narrow vision of professional service that would have ministered to the legal needs of his clients but ignored other needs as professionally irrelevant. *See* Shaffer, *On Being a Professional Elder*, 62 NOTRE DAME L. REV. 624, 627 (1987):

> Professional narrowness is immoral in a community that does not attend to what each of its professionals is liscensed to ignore. Professional narrowness is immoral in a community that does not preserve a moral context for professional service: What sense does the practice of family medicine, or the preparation of wills and trusts, of Jesus-Mary-and-Joseph, make in a community that leaves the family naked to its enemies?

> *Question 1.* Should a lawyer zealously represent the interests of her client even if the representation provokes hostility on the part of third parties that could endanger the lawyer's practice and conceivably even the lives of the lawyer and the lawyer's family members? Please refer in your answer to relevant provisions from the *Model Code* and the *Model Rules.*

Even this question, so phrased, can be made the fodder for an intellectual discourse probing the extent to which a lawyer must risk personal danger in service of a client's interests. But the real issue of *To Kill a Mockingbird*, and the one replicated on innumerable occasions in the lives of lawyers, is whether Atticus *will* do what on any reasonable evaluation he *ought* to do. To focus on this issue one must discuss both the moral capacity that Atticus brought with him to the ethical moment when he had to choose how to represent Robinson and the barriers to the exercise of that capacity erected by the particular circumstances. One must talk about a comfortable life and a successful practice, about the fear of losing such a life and such a practice and the taste of that fear.

For the kind of moral discourse to which *To Kill a Mockingbird* invites us, neither professional regulation nor philosphical reflection concerning ethics will be particularly useful. The impact of Atticus' character upon his practice illustrates that the moral issues encountered in the practice of law are not exclusively and perhaps not even chiefly those that moral philosophers find interesting, issues relating to the conflict between role morality and personal morality such as whether a lawyer can zealously advance the interest of a client that the lawyer finds personally repugnant.[54] The requirements of zealous advocacy and personal morality are frequently congruent, where the good lawyer and the good person are one and the same. In these circumstances, the question is not whether a given course of conduct is right but whether the right will be done: whether the solution of an ethical problem will be followed by an ethical act.[55]

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[54] One commentator has observed that the ethical failings of lawyers may more frequently consist not in the wrong done by aggressive advocates on behalf of clients, but in wrong done against clients by lawyers acting on behalf of themselves. *See* Schneyer, *supra* note 8, at 1532. I am more than a little inclined to believe that the most recurrent ethical issues of legal practice are those that pit the temptation of a lawyer to act in his own self-interest against the interests of either the client or other parties. Even when the lawyer's conduct advances the client's interests at someone else's expense, my own suspicion is that desire to serve the client was, at best, only a partial motivation for conduct. Advocates, I suspect, are frequently pursuing a personal victory first, and a victory for the client only second.

Nor are professional regulations particularly relevant to a discussion of the moral issue confronted by Atticus in *To Kill a Mockingbird.* It is, of course, possible to observe that both the *Model Rules* and the *Model Code* would have required any lawyer to provide Robinson a zealous defense, notwithstanding the personal character of the lawyer.[56] In a world in which the mere adoption of a rule guaranteed that everyone subject to the rule would, in fact, abide by its demands, such an observation might carry weight. But that is not the world Atticus lived in, nor is it the world lived in by most lawyers. Atticus, and we, inhabit a world where rules of professional conduct are not rigorously enforced,[57] and where, even when they are enforced, the threat of disciplinary action may not be sufficient to offset other pressures: the desire to make money or to be accepted by peers and by community, for instance. For Atticus, the danger posed by a drunken group of men from Old Sarum on the steps of the jail the night before trial was a far more tangible pressure toward cowardice than the remote, and perhaps even non-existent, pressure exerted by the threat of disciplinary sanction. If courage was to be exercised on the jailhouse steps, or in the Maycomb County courthouse, it would spring from some place other than professional rules of conduct. It would have to be pulled out of the storehouse of a man's past, where it had been laid up little by little through less dramatic acts of courage.[58]

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[55] *See* ARISTOTLE, NICOMACHEAN ETHICS 1105b, *supra* note 13, at 956 (suggesting that most people do not do the acts that produce a virtuous disposition, but rather "take refuge in theory and think they are being philosphers and will become good in this way, behaving somewhat like patients who listen attentively to their doctors, but do none of the things they are ordered to do").

[56] *See* MODEL RULES, *supra* note 2, Rule 1.3 & comment ("A lawyer shall act with reasonable diligence and promptness in representing a client."; "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); MODEL CODE, *supra* note 2, Canon 7 ("A lawyer should represent a client zealously within the bounds of the law").

[57] *See supra* note 11.

Thus, in the case of Atticus, and, I suspect, in the case of most lawyers, character is a far more important resource for effective advocacy than professional rules of conduct.[59] Atticus presented a real, rather than a sham, defense for Tom Robinson because of who he was, not because someone had pointed out to him an ethical canon requiring zealousness in the representation of a client. Moreover, although Model Rule 6.1 states that a lawyer "should render public interest legal service," whether a lawyer will in fact do so, I contend, has primarily to do with character traits such as justice, compassion, and generosity. For each of these issues, and many more that we could multiply, there are governing professional rules of conduct, but I contend that an individual lawyer's character will have more impact upon ethical conduct than any professional rule.

B. Character and the Limits of Zeal

Character, however, was not only a reservoir of attitudes and skills that made Atticus a more effective advocate, it was a limit upon the activities that Atticus would undertake as an advocate. For example, his courtroom manner was clearly a function of his character. He was courteous, although firm and penetrating. He neither shouted nor abused witnesses or opposing counsel, and we cannot imagine him doing so even if it would have advanced the cause of his client.[60]

Atticus Finch would have probably raised his eyebrows at the mention of something called adversary ethics. To him, the ethics of the courtroom was the ethics of the public street or the ethics of his home. The virtues that characterized Atticus' private existence also characterized his advocacy on behalf of clients.

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[58] *To Kill a Mockingbird* fails to present a clear narrative of a history of such acts undertaken by Atticus, and, accordingly, is less convincing that it might otherwise have been. Atticus, so far as we can see, *is* brave, but we do not see how he *became* brave. We become brave, Aristotle declared, "by being habituated to despise things that are terrible and to stand our ground against them." ARISTOTLE, NICOMACHEAN ETHICS 1104b, *supra* note 13, at 954.

[59] For the general distinction between "ethics of rules" and "ethics of character," see Norton, *Moral Minimalism and the Development of Moral Character*, in ETHICAL THEORY: CHARACTER AND VIRTUE, *supra* note 18, at 180-81.

[60] Scout commented on the distinction between courtroom lawyer debates that were "more acrimonious than professional," and observed that she had learned this distinction from lawyers other than Atticus. "I never heard Atticus raise his voice in my life, except to a deaf witness." P. 183.

Early in the book, Scout and a friend of the family, Miss Maudie, discussed the seamless nature of Atticus' ethics.

> "Atticus don't ever do anything to Jem and me in the house that he don't do in the yard," I said . . . .
>
> "Gracious child, I . . . wasn't even thinking about your father, but now that I am I'll say this: Atticus Finch is the same in his house as he is on the public streets."[61]

What Miss Maudie said about Atticus lodged itself in Scout's mind until the time of Tom Robinson's trial when she tried to explain what distinguished Atticus' courtroom style from that of the prosecutor. Atticus, though he conducted a cross-examination of Mayella Ewell and her father that destroyed the prosecution's case and no doubt humiliated the two witnesses in the eyes of all the trial spectators, remained courteous throughout the examination. He was so polite, in fact, that Mayella Ewell accused him of mocking her. The judge, however, assured her that Atticus was simply treating her like he treated everyone in the courtroom.

> "That's just Mr. Finch's way," he told Mayella. "We've done business in this court for years and years, and Mr. Finch is always courteous to everybody. He's not trying to mock you, he's trying to be polite. That's just his way."[62]

In contrast, the prosecutor deliberately appealed to the jury's racism by continually addressing Tom Robinson as "boy," and by referring to him as a "strong buck." One of the other children who attended the trial with Scout was so distressed by the prosecutor's cross examination that he had to be taken out of the courtroom. Outside, the boy, Dill, tried to explain his distress to Scout.

> "It was just him I couldn't stand," Dill said.

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[61] P. 53.

[62] P. 193.

> "Who, Tom?"
>
> "That old Mr. Gilmer doin' him that away, talking so hateful to him—"
>
> "Dill, that's his job. Why, if we didn't have prosecutors—well, we couldn't have defense attorneys, I reckon."
>
> Dill exhaled patiently. "I know all that, Scout. It was the way he said it made me sick, plain sick."
>
> "He's supposed to act that way, Dill, he was cross—"
>
> "He didn't act that way when—"
>
> "Dill, those were his own witnesses."
>
> "Well, Mr. Finch didn't act that way to Mayella and old man Ewell when he cross-examined them. The way that man called him 'boy' all the time and sneered at him, an' looked around at the jury every time he answered—"
>
> Well, Dill, after all he's just a Negro."
>
> "Mr. Finch doesn't."
>
> "He's not an example, Dill, he's—" I was trying to grope in my memory for a sharp phrase of Miss Maudie Atkinson's. I had it: "He's the same in the courtroom as he is on the public streets."[63]

Atticus' courtesy was a factor of his character that arguably made him a less vigorous advocate than he might otherwise have been. But both the *Model Code* and the *Model Rules* would have allowed Atticus to proceed with his courtesy, without being charged with failing to represent his client zealously.[64] DR 7-101(A)(1) of the *Model Code* states that a lawyer does not violate the requirement of representing a client zealously by "treating with courtesy and consideration all persons involved in the legal process." In fact, DR 7-106(C)(5) mandates adherence to "known local customs of courtesy or practice unless a lawyer gives opposing counsel timely notice of his intent not to comply." The *Model Rules* contain no explicit sanction for courtesy, but rather create a substantial zone in which a lawyer is free to bring his own moral perspectives and dispositions to bear upon the representation of a client.[65] This zone exists within the boundaries created initially by virtue of the lawyer's freedom to decline any representation except one to which he has been appointed.[66] But even when the representation has been undertaken by a lawyer, Rule 1.2 allows a lawyer to limit the objectives of a representation if the client consents after consultation. The comment to Rule 1.2 specifically suggests that the rule may be used to "exclude objectives or means that the lawyer regards as repugnant or imprudent." Similarly, Rule 1.16(b)(3) permits a lawyer to withdraw from the representation of a client even if the withdrawal will have a material adverse effect on the interests of the client, if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Finally, Rule 2.1 relieves an attorney of any notion that serving as a client's "yes man" is required of an advocate. The lawyer, according to this rule, is free to bring non-legal considerations to the attention of a client, including "moral, economic, social and political factors, that may be relevant to the client's situation."[67]

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[63] Pp. 211-12.

[64] In fact, the lack of civility among lawyers is a frequent subject of complaint by legal commentators. *See, e.g.*, Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 381 (1981); Burger, *The Necessity for Civility*, 52 F.R.D. 211 (1971) (remarks to American Law Institute, May 8, 1971).

Especially, under the *Model Rules,* then, adversarial zeal is tempered by entrusting attorneys with a certain amount of ethical freedom.[68] This freedom is crucial to professionalism.[69] The legal profession cannot depend upon ethical rules to secure upright behavior.[70] The rules of professional conduct have been and remain of far too coarse a weave to capture all the significant ethical issues involved in the practice of law.[71] Too many problems will slip through the mesh, unaddressed and untouched by the Bar's regulatory arm. Moreover, the now well-established use of professional rules as a basis for malpractice actions will almost certainly discourage attorneys from using professional codes or rules of conduct to express the aspirations of the Bar for outstanding practice.[72]

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[65] *See* Schneyer, *supra* note 8, at 1566 ("The Model Rules openly invite the lawyer to bring his personal values into play"). *See also* Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct,* 17 U.C. Davis L. Rev. 1049 (1984); Burt, *Conflict and Trust Between Attorney and Client,* 69 Geo. L.J. 1015 (1981). The *Model Rules* jetison the *Model Code's* requirement of adherence to local customs of courtesy on the grounds that this requirement is "too vague to be a rule of conduct enforceable as law." Model Rule 3.4, Model Code comparison.

[66] *See* Model Rules, *supra* note 2, Rule 6.2 & comment. The *Model Code* permitted the same freedom to decline representation. *See* Model Code, *supra* note 2, EC 2-26 ("a lawyer is under no obligation to [represent] every person who may wish to become his client"). *See generally* Wolfram, *A Lawyer's Duty to Represent Clients, Repugnant and Otherwise,* in The Good Lawyer, *supra* note 7, at 214, 216-18.

[67] The *Model Code* may recognize a similar zone of moral freedom, although both the existence and the parameters of such a zone are ill-defined by the Code. DR 7-101(B)(1) provides, for example, that a lawyer may, "where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." *See also* Model Code, *supra* note 2, EC 7-7 ("In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own"); EC 7-9 ("when an action in the best interest of [a lawyer's] client seems to him to be unjust, he may ask his client for permission to forego such action"). One commentator has construed DR 7-101(B) "as a sign that the drafters of the Code recognized the existence of, but could not specify, situations in which a lawyer would be entitled for reasons of conscience not to assert client rights." Schneyer, *supra* note 8, at 1548 n.70.

Once the legal profession is severed from the resources of character capable of restraining the morally repugnant reaches of zealous advocacy, then the only barrier to increasingly offensive adversarial strategies will be ever more detailed "Creeds of Professionalism" and the like, which attempt to post specific off-limit signs for the more egregious examples of zeal run amok.[73] Ethics, once divorced from character, is doomed to "statutorification,"[74] an ever increasing spiral of more detailed rules to regulate adversarial conduct. What is needed, rather than more codifications of courtesy, is a restoration of the language of character to discourse about legal ethics and a repeated iteration that attorneys are free, within broad limits, to act out of the resources of character in their roles as advocates.

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[68] On the lawyer's ethical discretion, *see generally* Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

[69] *See* Hazard, *supra* note 10, at 128 ("exemplary conduct" on part of lawyers may be achieved by emphasizing not only ethics as legal obligation, but as "volition exercised individually and collectively under difficult circumstances," as "ethical opportunity").

[70] *See id.* ("The bad news is that the legal profession must accept the prospect that there are serious and intratable limitations on successfully improving general standards of professional ethics by changing the rules or by more rigorously enforcing the rules as they stand").

[71] Rules of professional ethics share the same "open textured" quality that characterizes all legal rules. *See* H. L. A. HART, THE CONCEPT OF LAW 124-32 (1961).

[72] *See* Marks & Cathcart, *supra* note 11; Steele & Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 AM. B. FOUND. RES. J. 917.

[73] *See, e.g.*, Dondi Properties Corp. v. Commerce Savings and Loan Ass'n, 121 F.R.D. 284, 287-88 (N.D.Tex. 1988)(en banc)(per curiam); ABA Lawyer's Creed of Professionalism (1988).

[74] *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

IV. Character and Legal Education

If, as I have argued, character is an important resource for the practice of law, then we may well question the effect law school has upon it.[75] What kind of company is legal education to the character of law students?[76]

A. Character and the Company of Law

Intuitive evaluations of the impact of law school on personal character are commonly negative. Legal education has frequently been viewed as a kind of hot oil bath, in which flesh and blood humans survive as mere moral skeletons, stripped of the moral faculties and dispositions that give an individual life substance and meaning.[77] Law school has been judged by one nonlegal scholar to involve a "probable debasement of character."[78] And legal scholars have joined in the criticism of law schools as morally barren or worse. For example, in 1978 Roger Cramton argued that the curriculum and pedagogical approach of most law schools enshrined an "ordinary religion" hostile to what he refered to as "the beliefs and attitudes that anchor our lives."[79]

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[75] I do not address in this discussion the question of whether the character of either an applicant to or member of the bar should be grounds for rejection of a bar application or for professional discipline. *See* Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491 (1985). We may conclude that upright character is a crucial professional qualification without also concluding that the bar has either the competence or the resources to evaluate the character of its applicants or members.

[76] Professor Wayne Booth asks this question concerning the effect of narratives upon character in THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988). By asking this question we are returning to a classical understanding of the function of education as having to do with the formation of character. Plato, for example, defined education as "the rightly disciplined state of pleasures and pains whereby a man, from his first beginnings on, will abhor what he should abhor and relish what he should relish." *Laws*, in THE COLLECTED DIALOGUES OF PLATO 653b at 1250 (E. Hamilton & H. Cairns eds. 1961). *See also* ARISTOTLE, NICOMACHEAN ETHICS 1104b, *supra* note 13, at 954.

[77] James Agee, in a much different context, suggested the image of school as a bath of oil. *See* J. AGEE, LET US NOW PRAISE FAMOUS MEN 311 (rev. ed. 1988)("In school a child is first plunged into the hot oil bath of the world at its cruelest").

[78] W. BOOTH, THE VOCATION OF A TEACHER 264 (1988).

[79] Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 262 (1978).

Another observer has noted that students entering law school are more interested in moral issues than when they depart.[80]

But attempts to verify general intuitions about the inhospitability of law school to moral values have produced, at best, inconclusive results.[81] For example, Professors Shaffer and Redmount argue, on the basis of research involving students at law schools at Notre Dame, Indianapolis and Valparaiso, that character is not affected for better or worse in law school.[82] Character, they suggest, remains stable during the course of legal education.[83] They argue, nevertheless, that "[t]he cultivation of emotional and moral sensitivities, along with intellectual development, is the mark of thorough professional preparation for the lawyer."[84] Additionally, they conclude that legal education affects students' style of relationships with others in that students tend to become more controlling and to act with greater authority in these relationships, and that legal education "affects student attitudes in the direction of greater cynicism and less humanitarianism."[85] In general, Shaffer and Redmount contend that law school less demeans character and feeling than it makes them irrelevant both for the study and practice of law.

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[80] *See* Wasserstrom, *Legal Education and the Good Lawyer*, 34 J. LEGAL EDUC. 155, 160 (1984)(students more interested in and concerned about moral issues at the beginning of law school career than at end). *See also* Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 444 n.4 (1970)(quoting student as having observed that "the school taught us . . . to think less about social horizons than of bread and butter"); Kubey, *Three Years of Adjustment: Where Your Ideals Go*, 6 JURIS DR. 33 (1976)(student values changed by law school and students left with increased cynicism). *But see* Sammons, *supra* note 1, at 614 ("[Students] retain their habits of heart throughout their three years of law school. We do not need to reawaken their slumbering personal ethics at the end of those three years").

[81] *See* Stone, *Legal Education on the Coach*, 85 HARV. L. REV. 392, 422 & n.109 (1971)(assumption that legal education has long-term effects on personality, attitudes and values of law students "has never been adequately proven in an empirical sense"). For a survey of empirical studies of this issue, see Willging & Dunn, *The Moral Development of the Law Student: Theory and Data on Legal Education*, 31 J. LEGAL EDUC. 306 (1981).

[82] T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 4 (1977).

[83] *Id. See also* Willging & Dunn, *supra* note 81, at 358 (concluding on basis of empirical study involving subjects who were students at University of Toledo Law School that "the concerns of the students for justice and humaneness are neither nurtured nor impeded by the process of legal education").

[84] T. SHAFFER & R. REDMOUNT, *supra* note 82, at 19.

[85] *Id.* at 99, 103.

Moral judgments are suspended during law school, perhaps even labeled unessential.[86]

> It comes as a startling and a sad and even unexpected revelation from our findings that legal education and legal experience apparently do not significantly influence attitudes toward and expectations of the law. The law student begins his legal career with a sense of disappointment concerning the law but also with some hope for it. This hope is that the law can be related to human experience. Law student seniors, and our small but consistent sample of law faculty and practitioners, show virtually the same regard for law as it is, the same perceived discrepancy between law as it ought to be and as it is preferred. It is as though one becomes immersed in the mechanics of learning the law and then teaching or ministering with it, and through it all admits that critical human feelings and concerns are left untouched. Students feel that they learn little or nothing that aids them to make law more responsive to human concerns. Practitioners do little to change the character of law, or the way they practice law—their cynical, or unhappy, or disappointed, view of the law and what it does to people does not change, and the law itself does not change to something that is humanly sensitive and desirable.[87]

Insofar as the authors contend that legal education dehumanizes and "discourages students interest, concern and curiosity about clients and the character of their human experience,"[88] I am not sure why we may not properly call this effect an effect upon the *character* of law students.

The impact of law school upon character may have less to do with any fundamental change in the student's underlying character than in the particular form of moral schizophrenia to which students are introduced in law school. A student's earliest impression of legal ethics is likely to be that it authorizes the lawyer to take up residence in a peculiar moral universe in which ordinary moral principles are superceded by something called adversary ethics. For example, a student will discover that lawyers are widely viewed as being permitted to act as advocates for causes they would shun as immoral or unjust in their private capacities, and to engage in conduct that would be viewed as morally wrong from an individual perspective. This statement of "adversary ethics" is, of course, broader than almost anyone who has seriously pondered issues of legal ethics would advocate. Nevertheless, it expresses in rough strokes a sense that ethical rules somehow change upon entry into the legal profession, that what was true at home or in elementary school may not be true in the courtroom or around a negotiating table. How much the rules change is a subject of considerable debate. But almost any discussion of legal ethics (it is "*legal* ethics" and not just "ethics" that students study in law school) will carry with it the implicit assumption that a student must not lean too hard upon the moral values that have previously formed her conduct, because such values may be inappropriate in the professional setting.

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[86] *Id.* at 118.

[87] *Id.* at 108-09.

[88] *Id.* at 116.

The key issue for legal educators may then be not whether they should attempt to or even can teach virtue or character, but whether the pedagogical structure and general atmosphere of law school causes students to view the door entering the legal profession as an entrance beside which one must discard the values that previously guided conduct. There are a number of structural and atmospheric aspects of legal education that may in fact suggest precisely this view to law students.

First, students may perceive that character is unimportant and perhaps even inappropriate for the practice of law because of the conspicuous silence of law school towards the subject of character. This silence is all the more significant in view of the profound changes in the identity of students prompted by legal education,[89] changes that occur during a period in students' lives when students are still undergoing moral development.[90] The silence concerning character is also significant in view of the persistent criticism of the legal profession for moral deficiencies. By *not* talking about character and virtue in law school, we are teaching something about it.[91] We suggest that the criticisms are unfounded and that all is well.

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[89] Legal education is not simply a forum in which information is communicated, but a crucible in which persons are formed. *See* Elkins, *The Quest for Meaning: Narrative Accounts of Legal Education*, 38 J. LEGAL EDUC. 577, 577-79 (1988) (legal education is not simply matter of learning subject, but of becoming certain kind of person; law school is matter of quote "remaking ourselves"); T. SHAFFER, FAITH AND THE PROFESSIONS, *supra* note 20, at 3 ("Moral subjects are relevant to the formation of doctors and lawyers, who, in professional school and beyond, are in fact being formed"). J. WHITE, JUSTICE AS TRANSLATION 215 (1990)("[T]o speak and act like a lawyer, as one learns to do in law

Second, the importance of moral values and, consequently, of the character which incarnates these values, may be undermined by the steady diet of borderline cases and the constant

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school, is to commit oneself to a certain community and discourse, to enact a view of language and the world that entails an ethics and politics of its own, even to give oneself a certain character. . . .").

[90] Attempts to explore the impact of law school on moral development have generally focused upon the research of Lawrence Kohlberg. *See generally* L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981); L. KOHLBERG, THE PSYCHOLOGY OF MORAL DEVELOPMENT (1984). Kohlberg builds on the earlier foundation laid by Jean Piaget's work in the area cognitive development. Piaget established the methodology that Kohlberg has continued, according to which moral development is evaluated in terms of the various reasons given by individuals to justify moral judgments. *See generally* J. PIAGET, THE MORAL DEVELOPMENT OF THE CHILD (M. Gagain trans. 1962). Using this methodology, Kohlberg has identified six stages of moral development, occurring from age ten through the early thirties of an individual's life. Specifically, Kohlberg suggests that the fifth stage of moral development does not occur until age 23, and the sixth, not until age 30. *See* L. KOHLBERG, THE PSYCOLOGY OF MORAL DEVELOPMENT, *supra*, at 445-60; Kohlberg, *Continuities in Adult Moral Development Revisited*, in LIFESPAN DEVELOPMENTAL PSYCHOLOGY: PERSONALITY AND SOCIALIZATION (P. Baltes & K. Shaie eds. 1973). These ages correspond to the period when many individuals are students in law school and, accordingly, Kohlberg's work has been cited in connection with discussions concerning the moral development of law students. *See, e.g.,* Willging & Dunn, *supra* note 81, at 312-25; Richards, *Moral Theory, the Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359, 364-74 (1981); Landwehr, *supra* note 5; Bennett, *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 46-48 (1986); Dickinson, *Moral Development Theory and Clinical Legal Education: The Development of Professional Identity*, 22 U.W. ONTARIO L. REV. 183 (1984). For an attempt to apply the work of a wider range of developmental psychologists to the issue of moral development among law students, see Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237 (1988). Professor Wangerin criticizes the failure of legal educators to consider the work of developmental psychologists other than Kohlberg, and also charges that even Kohlberg's work has been delt with superficially by legal scholars. *See id.* at 1273. He notes, for example, that use of Kohlberg's six stages of moral development is dated, since Kolhberg himself has abandoned reference to a sixth stage of development for lack of empirical evidence demonstrating its existence. *Id.* at 1276-77.

[91] "[T]he approach of implicitly answering fundamental questions by not asking them pervades legal education: it is in fact the not-so-hidden message of law school." Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 512 (1987).

emphasis on uncertainty and instability of law that form a significant portion of the "Ordinary Religion of the Law School Classroom."[92]

Third, emphasis on legal techniques for advancing the interests of clients, with studied inattention to the moral rightness of those interests, tends to marginalize the importance of moral values and may leave students with weakened convictions about anything.[93] The sort of "learned cleverness" involved in training students to be aggressive advocates for either side in a dispute does not require "either a developed capacity to judge what is right or a disposition to seek it."[94] It may, in fact, superimpose over normal moral intuitions imbedded in the dispositions of character an indifference to moral claims capable of steadily eroding character dispositions themselves.

Fourth, law school introduces students to the role of advocates and begins to train them in the skills necessary for effective advocacy. These skills in their turn cultivate certain combative dispositions of character, and tend to diminish or otherwise classify as professionally irrelevant other dispositions such as compassion, generosity, and truthfulness.[95]

Finally, hostility of the Socratic method to intuitive value judgments undermines the foundation of character. By now, the apocryphal story is well-known of the Harvard professor who, when confronted with a student's complaint that the result of a case was not "just," replied: "If you want to study justice, you should have gone to divinity school." Professors Shaffer and Redmount recount a similar example derived from their study of tape-recorded law school class sessions:

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[92] Cramton, *supra* note 78, at 262. *See also* R. POSNER, THE PROBLEMS OF JURISPRUDENCE 43 (1990)("A big part of legal training, especially at the elite law schools, is exploration of the law's indeterminacies . . . .").

[93] *See* Taylor, *Law School Stress and the "Deformation Professionelle"*, 27 J. LEGAL EDUC. 251, 258 (1975)(quoting students who complained that law school practice of learning to argue both sides of case left some second-year students without strong convictions about anything).

[94] Eshete, *Does a Lawyer's Character Matter*, in THE GOOD LAWYER, *supra* note 7, at 272.

[95] *See id.* at 274-75 ("A firm and settled disposition to truthfulness, fairness, goodwill, and the like would thwart the lawyer's capacity to do his tasks well. To excel as a lawyer, combative character traits such as cunning are most beneficial. In this way, the conduct required of an adversarial lawyer gradually produces undesirable features on his character"). The development of adversarial dispositions may enhance a lawyer's skills as an advocate, but may undermine the development or retention of other dispositions also necessary to serve the needs of clients. *See id.*

> Professor: . . . What's a trial?
> Student: An adversary proceeding.
> Professor: For what purpose?
> Student: To discover the truth. (Silence for about five seconds, then laughter.)
> Professor: (After pause.) Who cares what truth is?
> Student: I care (loud laughter).
> Professor: Well, in your conversations with God, you can take those questions further. Brown, what's the purpose of a trial?[96]

In the 1940s, the English scholar C. S. Lewis focused upon the tendency of much of then current educational thought to debunk values and sentiment and claimed that the result of this kind of education was to create "Men Without Chests." The chest—sentiment or heart—was "the indispensable liaison officer[] between cerebral man and visceral man."[97] Lewis' conclusions about the ultimate end of education that created "Men Without Chests" were starkly negative and for that reason perhaps too strong an indictment against legal education. But they may contain a germ of criticism that would not go undeserved. "We make men without chests," he said, "and expect of them virtue and enterprise. We laugh at honour and are shocked to find traitors in our midst. We castrate and bid the geldings be fruitful."[98]

Perhaps we stretch the point too far to suggest that law school produces lawyers without chests, or even moral geldings. Nevertheless, it is hard to escape the conclusion that law school, at the least, has remained virtually silent on a topic of great importance, and at the worst, has by constant intonation of its "ordinary religion" demeaned the importance of character.[99]

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[96] T. Shaffer & R. Redmount, *supra* note 82, at 181-82.

[97] C. S. Lewis, The Abolition of Man 16 (1947).

[98] *Id.*

[99] *See* J. White, *supra* note 89, at 23:

> The essential feature of our experience . . . is the structural reciprocity between language and character (or what we call personality or identity). Each of us is partly made by our language, which gives us the categories in which we per-

B. Law School and the Language of Character

I have argued that law school has, or at least may have, an adverse effect on the character of law students by causing them to enter the legal profession after a three-year course of instruction in which issues of character have been muffled. Thus, one might suppose that the antidote to this effect would be to place character more deliberately on the law school pedagogical agenda. But there are several reasons why the language of character may seem out of place in the law school environment.

1. Moral Diversity and Character

Our ability to talk about character is bound to our ability to speak of virtue and vice, since character consists of dispositions to particular virtues or vices. But what if we can no longer speak coherently with one another about either virtue or vice? What if moral language has been shattered into a hundred clamoring voices that no longer share the same moral premises, if, as Alisdair MacIntryre suggests,

> [f]rom our rival conclusions we can argue back to our rival premises; but when we do arrive at our premises argument ceases and the invocation of one premise against another becomes a matter of pure assertion and counter-assertion.[100]

On first examination, the modern law school appears to be in precisely this predicament. We are familiar enough with the intractable disagreements over subjects such as abortion and distributive justice to suspect that our moral discourse has collided against impenetrable and conflicting premises. If the law school community cannot resolve such issues, which appear to lie within its normal range of competence, we might wonder how it can address the subject of individual virtue or character.

It is possible, however, to overstate the extent of moral diversity within either the law school community or the legal profession at large. We lack, to be sure, a shared view of human

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ceive the world and which form our motives; but we are not simply that, for we are users and makers of our language too; and in remaking our language we contribute to the remaking of our character and lives, for good or ill.

[100] A. MACINTYRE, *supra* note 4, at 8.

nature or of a purpose for human existence, such as might provide a foundation for moral deliberation, including deliberation concerning moral issues that arise in the practice of law. Nevertheless, it is possible to overestimate the measure of our moral disagreements and to pass too quickly over the broad level of our agreement on at least some general propositions.[101] We can, for example, find agreement for such propositions that a person who lies constantly without thinking is morally deficient, even if our intuitions about the appropriateness of lying under particular circumstances may differ. Our goal, then, must be to explore our various intuitions, to range them against one another and observe the nature of their clashing, and to seek to obtain further moral agreement by extrapolating from the intuitions upon which we agree.

2. Character and the Gentleman's Ethics

A second barrier to the introduction of the language of character within law schools may reside in negative connotations of the notion of "character" itself. As Robert Coles has suggested,

> [t]he very word may suggest a prescientific age; may remind us of pietistic avowals or moralistic banalities many of us have tried to put behind us; may bring up the specter of a word being used to protect the privileges of the well-born, the powerful—as if what is at issue is etiquette, polish, a certain appearance or manner of talking and carrying oneself.[102]

The notion of character has too frequently been aligned with racism or class superiority and may thus be discredited in our modern vocabulary. Nevertheless, if my previous argument is valid, the idea of character as a receptacle for the virtues is one that we cannot live without and which must accordingly be salvaged from the wreckage of a discredited past and reinstalled in our contemporary thinking. *To Kill a Mockingbird* is, in part, an attempt to demonstrate the tension between a virtue-based, as opposed to class-oriented, notion of a gentleman. In terms of the moral education that Atticus' children receive from him, character has much to do with being a "gentleman" or a "lady." For Atticus, these terms are receptacles for a range of character attributes. When the children were being abused by the cantankerous Mrs. Dubose, Atticus summed up the virtues called for in the situation under the heading of what it meant to be a gentleman. "Easy does it son," he said to Jem at one point, "She's an old lady and she's ill. You just hold your head high and be a gentleman. Whatever she says to you, it's your job not to let her make you mad."[103] And Jem, at least for a while, obeyed his father's admonition and counseled his sister to do the same when Mrs. Dubose launched into a diatribe. "Come on Scout," he whispered, "Don't pay any attention to her, just hold your head high and be a gentleman."[104] Mrs. Dubose herself was a "lady" in Atticus' estimation, not because of her lineage or social standing, but because of her courage.[105]

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[101] J. Stout, Ethics After Babel: The Languages of Morals and Their Discontents 212 (1988)("Our disagreement about what human beings are like and what is good for us does not go all the way down"). For an argument contesting the rather bleak picture of moral fraction presented by Alisdair MacIntyre in After Virtue, *supra* note 4, see generally J. Stout, *supra*, at 200-19.

[102] Coles, *On The Nature of Character: Some Preliminary Field Notes*, 110 Daedelus 131, 132 (1981).

But in Maycomb County, another gentleman's ethic competed for legitimacy with the one practiced by Atticus. The chief competitive use came from Atticus' sister, Aunt Alexandra. For her, "gentleman" and "lady" were terms of social, not moral, designation. Aunt Alexandra used these words like the grandmother in Flannery O'Connor's *A Good Man Is Hard To Find*, who dressed herself in preparation for a trip in such a fashion that "[i]n case of an accident, anyone seeing her dead on the highway would know at once that she was a lady."[106] Being a gentleman or a lady for Atticus had to do with the way that you treated other people, or responded to their treatment of you. Scout, hearkening to Atticus' understanding, recognized in another of her school mates the character of a gentleman by virtue of his compassion and tenderness towards the new first-grade teacher. She noted that Little Chuck Little was "a born gentleman," even though he was "another member of the population who didn't know where his next meal was coming from."[107] For Atticus, then, the ethics of lady and gentleman concerned the exhibition of classical virtues. For Aunt Alexandra, however, gentleman and lady were canisters for the characteristics of birth and family relation that distinguished the highest class of the Maycomb caste system from those beneath. Instead of rejecting the notion of character outright, I propose that we are far better served to reject Aunt Alexandra's version of the gentleman as high-born aristocrat, and embrace instead Atticus' vision.[108]

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[103] P. 109.

[104] P. 110.

[105] P. 121.

[106] FLANNERY O'CONNOR 138 (Library of America ed. 1988).

3. Teaching and Indoctrinating

One might object that an approach to legal ethics emphasizing matters of character and virtue would amount to moral indoctrination of students, or at the very least, transform law school classrooms into homilitical pulpits. My primary response to this spectre is to note that it is quite possible to explore notions of ethics as character without prescribing a particular model of the virtuous lawyer. To see ethics in terms of character is to participate in an approach to legal ethics, not to mandate particular answers. For example, in this discussion I have not attempted to propose the precise character ingredients of the upright lawyer but to propose a subject matter that has remained largely uncovered by law schools.[109]

A further response to the objection that teaching ethics in terms of character and virtue amounts to indoctrination is that this objection has credence only if we assume, in the first place, that law professors are capable of indoctrinating some or all of their students. This seems to me to be a rather shaky assumption, and I suspect that it is outright untenable with respect to a large number of law students. My experience with law students is that they come to law school with fairly rigid moral judgments and that it is a challenging task to cause even a tremor in these judgments, much less prompt their wholesale repudiation and the adoption of my own preferred judgments.[110] Concern over the possibility of indoctrination may well represent a certain *hubris* on the part of professors, an arrogant pretention that our words matter more than they do, that we are masters of the ship rather than simply laboring at the oars along with our students.[111]

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[107] P. 32.

[108] Understanding character in terms of a "gentleman's ethic," has a drawback in that "gentlemen," including Atticus Finch, are typically far too solicitous of existing social structures, including those that are manifestly unjust. Thus, one may criticize Atticus for failing to challenge the dominant racism of Maycomb County. Even his representation of Tom Robinson is one thrust upon him; he did not volunteer. While I think this criticism of a "gentleman's ethic" is weighty, I nevertheless hesitate to abandon this potential source of a possible shared vision of character.

[109] The attempt *not* to propose simple answers to questions involving ethics as character has, in fact, been the grounds of one criticism of Professor Thomas Shaffer's work. *See* Ayer, *Narrative in the Moral Theology of Tom Shaffer* (Book Review), 40 J. LEGAL EDUC. 173, 181 (1990)(critizing Shaffer's emphasis on having character without specification of what character ought to be had).

To display alarm at the prospect of indoctrinating students about virtue and character is also to assume that law schools are otherwise free from indoctrinating influences. This assumption is even more far-fetched than the last. If by indoctination we mean the frank expression by law professors of their value commitments, then most law school faculties have their fair share of professors who openly avow their visions of social justice or other fundamental commitments. Nor should we be alarmed at such avowals and prefer the lofty indifference of neutrality. The silence of law school professors is its own kind of indoctrination, an indoctrination into what is important and what is unimportant, about what can be made the subject of rational discourse and what cannot. We whisper even when we do not speak.[112]

4. The Teachableness of Character

A final barrier to introducing the vocabulary of character to the law school classroom is the widespread belief that virtue cannot be taught. I have attempted to respond to this argument in the previous discussion by suggesting that law school should concern itself not such much about teaching virtue as about the extent to which it suggests that character is professionally irrelevant. Even if we cannot teach courage or justice or generosity or truthfulness,[113] we can at least discuss the place of these virtues in the practice of law, both as a resource for serving clients and as a limitation upon adversarial zeal.

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[110] *See* Eisile, *Must Virtue Be Taught?*, 37 J. LEGAL EDUC. 495, 505 (1990)(difficulty of teaching virtue).

[111] *See id.* at 503 (arrogance of fear of indoctrination).

[112] Having labored to distance the ethical perspective I am advocating here from the charge of indoctrination, I must nevertheless confess my belief that law professors ought from time to time reveal their own moral intuitions and the application of those intuitions to law practice. As one commentator has noted, it may be beneficial "with appropriate caveats" to reveal ideological (and I would add "moral") commitments to students as a part of a "shared enterprise" of legal reflection. *See* Stone, *supra* note 81, at 417.

C. Finding a Place for Character

Law school stands at a critical juncture in the lives of students. It is a changing room, where students begin to take upon themselves the garb of lawyers. They come to this changing room with an assortment of moral dress, with values and dispositions inculcated through their past histories, with virtues and, with vices. If law school cannot cause students to set aside the vices that they bring with them to law school, it must at least see that they do not assume that moral virtue is somehow an inappropriate accessory to technical legal ability and adversarial zeal. As we have seen, much in the present structure of law school may tend to suggest this assumption to students. The law faculty's chief function with respect to virtue and character is to contradict this assumption, and to explore with students the place of character within the practice of law. Students should be cautioned against the error of supposing that in the course of law school, they are being initiated into a world where they are by legal and professional obligation to sacrifice their character at the altar of adversarial justice. If students ultimately enter such a world, it will be one that they have created. They must be taught to recognize that to the extent that law school tends to turn them into men and women without chests, the transformation may well not be by conscious design. They must be made aware that there is among legal scholars and teachers intense discussion about the need for more focus on the ethical dimensions of practicing law.

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[113] *But see infra*, text accompanying notes 132 to 133.

How then, does the law school faculty demonstrate the relevance of character to the practice of law? Principally, I think, by emphasizing "thick descriptions" of the life in which lawyers practice and as to which the law is applied.[114] Engaging in "thick descriptions" requires participating in a "discourse that partakes of the richness and particularity of routine factual description."[115] Such descriptions are routinely made a part of the pedagogy of the law through factual descriptions in the appellate cases reproduced in law school casebooks.[116] These thick descriptions must be expanded to embrace the lives of lawyers as they touch upon both the particular issues that become the subject of reported cases and the unreported events that make up the lives of those who practice law. By thus demonstrating the life behind the facts of cases, including the life of lawyers, law professors may from time to time suggest the issues of character that occur in this life.[117]

The thick descriptions we seek to create should explore the tension between moral disposition and temptation. For example, students bring with them to law school certain dispositions about justice, honesty, and diligence. When they depart from law school they will find those dispositions exposed to pressures—to temptations—for which they will have had little advance warning unless they receive such a warning from a law professor who knows at least somewhat more than most law students about the temptations of practice.[118] I doubt that many law students leave law school expecting to appropriate client funds for their own use. Nevertheless, some of them will do so, and perhaps they will do so in spite of anything that a law professor could tell them. But just possibly, by exposing students in the cloister of the law school classroom to thick descriptions concerning the financial pressures that lawyers sometimes experience, they will have a chance to pre-experience a moral crisis and perhaps pre-determine a moral choice. We cannot, of course, guarantee moral success by this pedagogical approach, but perhaps we can increase the odds.[119]

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[114] *See* B. WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 128-30, 142-50, 167-73 (1985), *quoted in* Edmundson, *Lawyer's Justice* (Book Review), 88 MICH. L. REV. 1833, 1851-52 (1990)(reviewing D. LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988), and P. HEYMANN & L. LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES (1988)).

[115] *See* Edmundson, *supra* note 114, at 1851.

[116] The descriptions are abbreviated of course, and accordingly distanced from the actual events out of which they arose. *See* Lopez, *Training Future Lawyers to Work With the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 336 (1989)(legal education tends to "abstract away from both daily routine and rich description and to position students (and faculty for that matter) at a considerable distance from the very human events with which law and lawyers regularly deal").

[117] *See* Sammons, *supra* note 1, at 621 (emphasizing the need to "reconnect the law and legal processes to people and reconnect people to their lawyers and reconnect all three to morality"). The provision of a thick description that includes the lives of lawyers is one of the chief contributions of case studies that include not only the facts of a legal problem as they pertain to the parties to the problem, but also as they pertain to the lawyers called upon to represent the parties. *See, e.g.*, P. HEYMANN & L. LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES (1988).

Because of its historical and temporal focus, the ethics of character and virtue will find its chief illustrations more in stories and other extended forms of narrative than it will in hypotheticals that are atemporal or narrowly limited to a brief moral moment.[120] Moreover, the value of stories is their ability to "evoke concrete experience, and . . . inspire in the reader a mimetic, an empathic response: the psychological and moral imagination awakened."[121] Stories offer some hope that "the heart's motions be invigorated."[122] Morals, Professor Shaffer has suggested, begin in stories.[123] Thus, at least part of the value of the recent emphasis upon "Law and Literature"[124] is that this emphasis may allow thickly described texts about law and lawyers, and a moral discourse derived from these texts, to find a place within the legal academy.

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[118] I have in mind, for example, the temptation to lie to clients in order to gain a personal advantage, *see generally* Lerman, *supra* note 46; to procrastinate after having undertaken more work than reasonably can be managed, *see* Burger, *supra* note 64, at 380 (citing incompetence, neglect, and procrastination as the most common client complaints about lawyers); or to shirk service to people unable to pay for it in quest of ever higher billable hour totals, *see* Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 734-36 (1988)(charting economic forces that have lessened dedication to public interest among "the elite private bar").

[119] I have attempted to use the technique of thick description in discussing *In re* Warhaftig, 106 N.J. 509, 524 A. 2d 398 (1987), *reprinted in* S. GILLERS & N. DORSEN, *supra* note 6, at 290-92. *Warhaftig* involved an action arising out of disciplinary proceedings against a lawyer who invaded his clients' escrow account and was ultimately disbarred. The opinion contains a brief discussion of the personal circumstances that prompted the attorney to engage in conduct he clearly perceived as "wrong" which I attempt to elaborate upon by describing in detail the kinds of financial pressures that I experienced in my own early years of practice.

[120] For a discussion of the role of stories in moral teaching, see R. COLES, THE CALL OF STORIES: TEACHING AND THE MORAL IMAGINATION (1989); Tappan & Brown, *Stories Told and Lessons Learned: Toward a Narrative Approach to Moral Development and Moral Education*, 59 HARV. EDUC. REV. 182 (1989).

[121] R. COLES, HARVARD DIARY: REFLECTIONS ON THE SACRED AND THE SECULAR 201

In part, the restoration of character and virtue to the vocabulary of legal education may require a retreat from attempts to banish feeling and emotion from the classroom.[125] The legal persona whose creation is begun in law school has too frequently been a kind of mask with only narrow slits for seeing and no place to breath. But since at least part of the language of character involves talk about feeling and emotion,[126] legal education must attempt to reclaim these subjects,[127] to reinforce emotion with rational analysis rather than to debunk it altogether.

(1988).

[122] *Id.* at 203.

[123] T. SHAFFER, *supra* note 20, at 1. For a useful compilation of potential sources of stories about lawyers and the practice of law, see Elkins, *A Bibliography of Narrative*, 40 J. LEGAL EDUC. 203, 209-12 (1990).

[124] *See, e.g.*, J. WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); J. WHITE, THE LEGAL IMAGINATION (1973); J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984); Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U.L. REV. 179 (1985); Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983); Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); *Symposium: Legal Storytelling*, 87 MICH. L. REV. 2073 (1989).

[125] The comment of a woman in Scott Turow's account of his first year at Harvard Law School probably echoes in the places where first-year students gather at other law schools:

> [I]f [the professor] doesn't want to know how I *feel* . . . I *feel* a lot of things . . . and they have everything to do with the way I *think* . . . I don't want to become the kind of person who tries to pretend that my feelings have nothing to do with my opinions. It's not *bad* to feel things.

S. TUROW, ONE L 92 (1977).

[126] Aristotle's theory of virute maintained that the virtues were not simply dispositions to act in certain ways, but habituated feelings associated with virtuous acts. "[T]he man who does not rejoice in noble actions is not even good; since no one would call a man just who did not enjoy acting justly, nor any man liberal who did not enjoy liberal actions; and similarly in all other cases. If this is so, virtuous actions must be in themselves pleasant." ARISTOTLE, NICOMACHEAN ETHICS 1099a, *supra* note 13, at 945. Even if one rejects Aristotle's contention that a virtuous act requires a virtutous feeling, it is difficult to imagine how one can discuss virtues such as courage without probing the effect of emotions such as fear.

[127] *See* Elkins, *supra* note 9, at 760.

Legal education that takes character seriously will also warn students that "thinking like a lawyer" may not be an unmitigated good. A concern for the character of students suggests that law teachers should at least warn students of the steady drag upon certain aspects of their character which the practice of law will entail.[128] Even granting that the practice of law may appropriately require a lawyer to "do for a guinea what . . . he would think it wicked and infamous to do for an empire,"[129] law teachers should caution students how ordinary lawyer conduct will inevitably leave its mark upon the lawyer's character even after the lawyer's role has been set aside at the end of the day.[130] In fact, it is more than a little possible that the lawyer's role—the legal persona—cannot be shuffled on and off as though it were a bulky sweater, but it will, in time, come to dominate an individual's personality.[131] If this occurs, then the moral dispositions imprinted by the practice of law will become the dispositions that reveal themselves in an individual outside of work.

As to the more difficult issue of whether character can be taught in addition to being made simply welcome, the law school faculty must not immediately hide behind the claim that character is unteachable.[132] Perhaps it cannot be taught in the sense of being communicated in the format of a six-steps-to-a-more-courageous-you kind of lecture. However, there is a sense in which we all teach each other constantly as we live lives before one another, and law school faculty must be aware that their conduct teaches students by their conduct the kind of character that the legal profession esteems.[133]

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[128] But for an argument that the practice of law may in fact enhance the character attribute of sound judgment, see Kronman, *Living in the Law*, 54 U. Chi. L. Rev. 835 (1987). *See also* Luban, *supra* note 118, at 721 (lawyers as embodying Aristolelian virtue of *phronesis*, or "practical wisdom")(citing L. Brandeis, *The Opportunity in the Law*, in Business—A Profession 315, 317 (1914)).

[129] Macauley, *Lord Bacon*, in 2 Critical and Historical Essays 121, 152 (F. Macauley ed. 1903).

[130] *See* Eshete, *Does a Lawyer's Character Matter*, in The Good Laywer, *supra* note 7, at 274 (persistent adversarial practices "must leave its trace on a person"; and since legal profession is socially rewarding calling, lawyer will have little impetus to "retain character traits contrary [to those required as an advocate] or to resist the cultivation of traits corresponding to them"). *See also* Kronman, *supra* note 126, at 841-42 ("There is nothing, in the nature of things, that absolutely requires that the various activities of which one's professional existence is composed be character-forming . . . . I believe, however, that the practice of law exerts a very strong pull in this direction. . . . It is perfectly legitimate to wonder whether the sort of person one is likely to become through long immersion in the law is the sort one may reasonably take pride in being or have reason to wish to become").

[131] *See* Elkins, *supra* note 9, at 749.

[132] *To Kill a Mockingbird* is a novel which not only explores the impact of Atticus Finch's character upon his conduct, but also the moral education of his children. A quo-

Finally, faculty and students alike need reminding that there are no clients in law school and therefore no adversary roles to skew the demands of character. Law school does not transform arrogance and cruelty into virtues simply because

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tation from Charles Lamb at the beginning of the book, "Lawyers, I suppose, were children once," has a double meaning. The novel demonstrates that Atticus the lawyer acted according to a character that had been molded over a lifetime. It also tells the story of how Atticus' children, Jem and Scout, developed morally themselves. Jem, we suspect will be a lawyer, and we also suspect that he will share much of the character of Atticus. Early in the book, Scout speaks ironically about the kind of education she is receiving at home, and the irony alerts us that education may take many forms. When Scout's first-grade teacher instructed her to tell Atticus not to teach her any more about how to read, so as not to frustrate the teacher's carefully structured reading program, Scout responds: "Teach me?" I said in surprise. "He hasn't taught me anything, Miss Caroline. Atticus ain't got time to teach me anything," I added, when Miss Caroline smiled and shook her head. "Why, he's so tired at night he just sits in the livingroom and reads." P. 21-22. By the book's end Scout has concluded, perhaps without sufficient awareness of Atticus' teaching role as a model of character, that there wasn't anything much left for her to learn "except possibly alegebra." P. 294.

[133] *See* Eisile, *supra* note 110, at 501, 505:

> What is missing from all too many of our courses is exactly the intent of teachers to put themselves forth as exemplars of virtue or excellence. . . . To teach is to ask others to follow, and thus to risk misleading others. To ask someone to follow you is to ask him or her to make a choice, to make a commitment, to follow you rather than to follow someone else. It is, at least implicitly, to claim a value for yourself, to say that you are more worth following than someone or something else also available to the student. To turn students loose, without example and without direction, in the name of neutrality or tolerance, so that these students must find themselves on their own, if and when they can, is not a better or truer alternative to setting an example for them. They *will* follow someone, something; they *will* become acculturated, if not to our culture, then to another.

See also Mulcahey, *A Plea for Moral Education in Law Schools*, 2 J. LAW & RELIGION 101, 104 (1984)("Teachers do in fact teach morals and cannot avoid doing so."). Professors Shaffer and Redmount argue that "[i]f the strongest sources of lawyer behavior are in law school at all—and we doubt that they are—the sources rest more in environmental factors—climate, teaching style, etc.—than in curricular factors, more in the way people treat one another than in syllabi for courses." T. SHAFFER & R. REDMOUNT, *supra* note 82, at 37.

these vices have been incorporated into a particular pedagogical approach (the Socratic tyrant approach). It does not create an ethical zone in which it suddenly becomes permissible to treat people as objects, or to focus so much on the task at hand that service to one another is forgotten.

V. CONCLUSION

Talk about character and virtue is messy. It is talk in which we must constantly bump up against the diversity of our backgrounds, traditions, and moral intuitions. We can seek to avoid this kind of talk by concentrating on professional rules, or by attempting to construct broad moral systems that will embrace our fragmented ethical visions in wholeness. The former enterprise is doomed to leave unaddressed the most crucial springs of ethical behavior, the character of law professors, students, and practitioners. The latter enterprise is doomed likewise to failure, because of the foundational void created by our conflicting moral premises and our inability to articulate a consensus view of either human nature or human purpose.

The way ahead lies in retreat to an older vocabulary, one that speaks of character and virtue. We must give up imagining that the moral conundrums we seek to resolve in law school are what ethics is mostly about, and pay more attention to the far more humdrum but inexorably present ethical tensions that lawyers actually experience. These are the tensions for which an ounce of character is worth a pound of philosphy, and a boring moral platitude more valuable than the most finely crafted model rule. We are, then, thrown back upon the character formed in the diversity of our past. Our moral intuitions agree on some points but are badly fragmented on others. Our visions of upright character have been corrupted by vices such as racism and paternalism, but in these visions lies our chief wealth of moral agreement. Our various platitudes line up together sometimes in surprising unity, enough so to suggest that it may still be possible to articulate a professional vision apart from rules enforced by sanction, one in which its members define the contours of permissible conduct less by appeal to rules and standards, than by asking what kind of people they wish to be.

THE RULES OF PROFESSIONAL CONDUCT IN MISSISSIPPI

*William M. Champion**

I. Introduction

Effective July 1, 1987, the Mississippi Supreme Court adopted a variation of the ABA's *Model Rules of Professional Conduct* (*Model Rules*), the *Mississippi Rules of Professional Conduct* (*Mississippi Rules*) as the standard to govern lawyer conduct in Mississippi. The *Model Rules* replaced the *Model Code of Professional Responsibility* (*Model Code*)[1] and are broken down into eight principal sections,[2] each dealing with a different aspect of the lawyer's activities. Each section is composed of somewhere between three and sixteen rules, and each rule is followed by a comment that provides some clarification as to the meaning of that particular rule.

Of course, there are decisions of the Mississippi Supreme Court further clarifying certain rules, and the Mississippi State Bar, through its Ethics Committee and Board of Bar Commissioners, promulgates opinions dealing with questions that have arisen under particular rules. Most of the decisions and Ethics Opinions that were addressed to the Code of Professional Responsibility appear to apply equally to the Rules.

In this article I will analyze the various rules, illuminating

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* B.S. Mississippi State University
LL.B. The University of Mississippi
LL.M. The George Washington University
Professor of Law, The University of Mississippi

[1] The *Code of Professional Responsibility* previously in force in Mississippi was also patterned after an ABA Model. The *Model Code* was adopted by the Mississippi Supreme Court, effective March 15, 1971. There was no particular hue and cry to abandon the *Model Code* in favor of the *Model Rules* when the change took place.

[2] These sectios are: Client-Lawyer Relationship; Counselor; Advocate; Transactions With Persons Other Than Clients; Law Firms and Associations; Public Service; Information About Legal Services; and Maintaining the Integrity of the Profession.

them through the medium of the comments, decisions and Ethics Opinions. The purpose of this article is to provide the bar with a short manual that may be used as a ready reference on these rules and their meaning.[3]

II. Misconduct

It is interesting to note that a definition of "misconduct" does not appear until the fifty-first rule since only fifty-two rules have been promulgated.[4] The initial fifty rules describe the standards that a lawyer must meet, but only near the end does a rule state that a failure to comply with these standards constitutes misconduct.[5] In this regard, the rule specifically provides:

> *RULE* 8.4 Misconduct
> It is professional misconduct for a lawyer to:
>
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;[6]

Of course, the Rules only apply directly to lawyers. An argument may be made, then, that only lawyers can violate them. Therefore, the argument would proceed, the prohibition against assisting or inducing another to violate the Rules is operative only where one lawyer is involved with another in regard to the prohibited conduct. This syllogism should offer scant comfort to the offending attorney because the last phrase quoted above labels as misconduct "violations through the acts of another." There is no basis for assuming that this other person must be a lawyer.

The definition of misconduct continues as follows:

> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other

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[3] Three years as a member of the Committee on Professional Responsibility of the Mississippi State Bar taught me that there is appalling ignorance of the Rules running rampant among our brothers and sisters at the bar.

[4] Miss. Rules of Professional Conduct Rule 8.4 (1987) [hereinafter MSRPC].

[5] MSRPC Rule 8.4(a) (1987); *cf.* Mississippi Code of Professional Responsibility DR 1-102[A] (1971) [hereinafter MSCPR] (at beginning of Code, lawyers are told that they may not violate its provisions).

[6] MSRPC Rule 8.4 (1987).

> respects;
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice;
>
> (e) state or imply an ability to influence improperly a government agency or official; or
>
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.[7]

The comment to the rule notes that while many forms of illegal conduct reflect adversely on one's fitness to practice law, others do not. It continues that the traditional distinction was made in terms of matters involving "moral turpitude," and notes that some conduct, such as adultery, might violate certain standards of moral turpitude without having any relationship to one's fitness to practice law. The comment concludes that one should not be accountable for conduct that does not "[i]ndicate lack of those characteristics relevant to the law practice."[8]

One Mississippi case should be considered in the light of this rule, even though the rule was not involved in the decision. The case of *Rhodes v. Rhodes*[9] dealt with a situation where an attorney had been divorced from his wife, and had failed to pay her child support and to make automobile insurance premium payments as required by the divorce decree. After a hearing, the Chancery Court of Hinds County found him to be in contempt for a wilful failure to comply with the decree, and ordered that he be barred from practicing law in that court until he purged himself of the contempt. The Supreme Court agreed that he was in contempt, but reversed the sanction barring him from appearing in the Chancery Court of Hinds County. The court reasoned:

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[7] MSRPC Rule 8.4(b)-(f) (1987).

[8] *Id.* Rule 8.4 comment (1987). In Cord v. Gibb, 219 Va. 1019, 254 S.E.2d 71, 71 (1979), an applicant to the Virginia Bar was denied admission on the ground of poor moral character. The stain on her character was the fact that she was living with a man to whom she was not married. The Virginia Supreme Court, per curiam, reversed this denial, observing that her living arrangement had no "[r]ational connection to her fitness to practice law." 254 S.E.2d at 73. While it is arguable that this case is not directly in point, it reflects the basic philosophy of the comment. Miss. State Bar Ethics Op. 143 (1988) holds that it is not professional misconduct for a lawyer to give a check for personal goods or services where the check is not honored due to insufficient funds in the lawyer's account. The opinion puts great weight on the personal nature of the transaction, and specifically declines comment on those instances of a bad check drawn on the lawyer's business or trust account, or those instances where the issuance of the check constitutes a criminal offense.

[9] 420 So. 2d 759 (Miss. 1982).

> [A]n attorney should not be disciplined for misconduct outside of his professional capacity unless such misconduct is of a serious nature, and tends to show him to be an unfit person to be an attorney. In some jurisdictions, the courts lack authority to disbar an attorney for misconduct committed in his individual capacity and not in a professional capacity. (cites omitted).[10]

One may agree with the above statement and still wonder how an attorney can be in contempt of court in any but his professional capacity. In other words, do we cease being officers of the court merely because we become litigants? The Mississippi Supreme Court appears to answer this question in the affirmative. At the time this decision was handed down, the Mississippi State Bar was governed by the Code of Professional Responsibility, rather than by the Rules. However the Code, like the Rules today, contained a provision that a lawyer shall not engage in conduct that is prejudicial to the administration of justice.[11] If an attorney disrepects a court order, regardless of the context, it is hard to understand why this is not prejudicial to the administration of justice.[12]

III. THE RELATIONSHIP WITH THE CLIENT

Sixteen rules fall under the broad heading of "Client-Lawyer Relationship." Perhaps this reveals something about us, since the next greatest number of rules is only nine, and these rules concern the treatment of the lawyer as an advocate.

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[10] *Rhodes*, 420 So. 2d at 761.

[11] *Compare* MSCPR DR 1-102[A][5] (1971) (laywer shall not engage in conduct prejudicial to administration of justice) *with* MSRPC Rule 8.4(d) (1987) (professional misconduct for laywer to engage in conduct prejudicial to administration of justice).

[12] I recognize that an attorney might be justified in manifesting contempt for a court when this is done to further the exercise of political speech. However, if he does, the Constitution must save him because the Rules do not.

A. Competence

The first group of rules concerning the client-lawyer relationship require that a lawyer provide competent representation.[13] There was no exact counterpart in the Code of Professional Responsibility, although the Code certainly did call for attorney competence.[14] From time to time, one encounters an argument to the effect that law is a business like many other callings.[15] One implication of this position is that market forces should regulate it. However, as long as we have ethical rules requiring that we be competent, it is clear that the profession is not treating itself as just another business, and is not relying on the market place to weed out the incompetent.[16]

Competence is often in the eye of the beholder, but the comment to the rule sheds some light on its meaning.[17] In applying the concept, one must balance the complexity of the matter; the lawyer's general experience, as well as his or her experience in the particular field; the preparation, including study, that the lawyer gives to the matter; and whether the lawyer should have consulted with someone more accomplished in the particular field.[18] The thrust seems to be that if a lawyer is not qualified to handle a certain matter, the lawyer should leave it alone. However, this does not mean that a lawyer must be experienced in a particular type of representation before undertaking it.[19]

B. Diligence

The requirement that a lawyer act with reasonable diligence is closely related to competence because it is sometimes difficult to determine which rule is violated.[20] After three years as a member of the Mississippi State Bar's Committee on Professional Responsibility, I know that alleged violations of this rule are far and away the major cause of complaints against lawyers. This rule refers to the avoiding of procrastination, and is not a mandate to pursue every avenue that might be available. Oftentimes a lawyer will by-pass an apparent advantage for tactical reasons.[21]

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[13] MSRPC Rule 1.1 (1987).

[14] *See* MSCPR DR 6-101 (1971) (what constitutes failing to act competently).

[15] *See, e.g.*, Armstrong, *The Law: Business or Profession?*, 18 MEMPHIS ST. U.L. REV. 81 (1987) (practice of law is a business as well as profession); Rehnquist, *The State of the Legal Profession*, 14 LEGAL ECON. 44 (March 1988) (law becoming more like business). Both authors recognize law practice has elements of a profession and a business.

[16] The "market forces" argument does not make much sense anyway. If you buy a car, you know if it performs well, and if you purchase a meal, you know if it tastes good. However, most clients have little idea as to whether the lawyer is providing competent representation unless the matter completely falls apart.

[17] MSRPC Rule 1.1 comment (1987).

[18] *See* MSRPC Rule 1.1 comment (1987).

[19] MSRPC Rule 1.1 comment (1987).

C. Communication

Frequently problems that appear to be the result of a lack of diligence are, instead, the product of a lack of communication. The Rules require that a lawyer keep a client informed about the status of the matter involved in the representation, and also require that the lawyer explain things to the client to the extent reasonably necessary to permit the client to make informed decisions relative to the matter.[22]

The manner in which a representation is to be conducted must, in many regards, be left to the professional judgment of the lawyer. The Rules deal with this by making the determination of the objectives of the representation a matter of the client's decision, while leaving the means by which they are to be pursued up to the lawyer after consultation with the client.[23] Of course, the lawyer may not assist the client in matters that are criminal or fraudulent, and she must explain the limitations placed on her by the Rules or other laws if the client expects assistance not permitted thereby.[24]

In obeying the mandate for adequate communication, the lawyer must communicate so that the matter can be comprehended by the client. If the client is under the disability of minority or of mental difficulties, the lawyer may seek to have a guardian appointed, or take other protective actions. This should be done only if the lawyer cannot adequately act in the client's own interests.[25]

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[20] *Id.* Rule 1.3 (1987).

[21] *Id.* Rule 1.3 comment (1987).

[22] *Id.* Rule 1.4 (1987).

[23] *Id.* Rule 1.2(a) (1987).

[24] *Id.* Rule 1.2(d), (e) (1987).

D. Client Confidences

Communication is a two way street, and a client must provide the lawyer with considerable information in the typical representation. The client cannot be expected to disclose sensitive matters, even to his attorney, if he fears that this might be revealed to third parties. Accordingly, the Rules prohibit a lawyer from disclosing information "relating to the representation of a client" without the consent of the client.[26] The lawyer is permitted, although not required, to disclose without authorization information that he or she believes is necessary (1) to prevent the client from committing a criminal act,[27] or (2) to establish his claim or defense against his client, or a defense to a criminal charge, or to respond to any proceeding concerning the lawyer's representation of the client.[28] The lawyer is also permitted, although not required, to reveal such information to the extent required by law or by court order.[29]

The duty of confidentiality is owed to the client even after the client's death. Thus, the family of a deceased client is not entitled to the contents of the client's file, particularly when the decedent expressly requested that the matters be kept in confidence.[30] On the other hand, where the best interests of the client's estate warrant certain disclosures, the lawyer may do so after obtaining the consent of the decedent's personal representative or heirs, pursuant to court order or as required by law.[31] Both of these points were established by ethics opinions of the Mississippi State Bar in 1986. In one case where disclosure was approved, the client had been murdered and the question was to what extent the lawyer could cooperate with law enforcement officials investigating the homicide.[32]

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[25] *Id.* Rule 1.14 (1987).

[26] *Id.* Rule 1.6(a) (1987). This represents quite a departure in form from the Code that distinguished "confidences" ("information protected by the attorney-client privilege") and "secrets" ("other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client"), even though the unauthorized disclosure of either was generally prohibited. MSCPR DR 4-101 (1971).

[27] MSRPC Rule 1.6(b)(1) (1987). Under ABA Model Rule 1.6(b)(1), the lawyer is permitted to reveal the confidence in order to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm. The Mississippi rule is not so restrictive.

[28] MSRPC Rule 1.6(b)(2) (1987).

[29] *Id.* Rule 1.6(c) (1987). This provision does not appear in the ABA MODEL R. PROF. CONDUCT.

[30] Miss. State Bar Ethics Op. 124 (1986).

Conversely, there is also a duty to protect the client's confidence after the attorney is dead. This problem is particularly acute in the case of the solo practitioner. If a nonlawyer takes control of the lawyer's files the State Bar or rules of ethics cannot prevent such action. Of course, if the nonlawyer is the personal representative, and is assisted by a lawyer in meeting these responsibilities, the assisting lawyer must take steps to protect the client's confidences. Where the representative is also a lawyer, the duty is clear. The client must be contacted and given the opportunity to review the file and remove anything he or she wishes to remove. If the lawyer responsible for the decedent's property cannot tell who to contact without looking into a file, he or she may do so, but such action is subject to the requirement that the file be examined no more than is necessary to gain this information.[33]

E. Fees

The practice of law constitutes the providing of a service by a professional. For this, the professional should be compensated, and those in private practice are compensated by the fees they charge their clients. This is an integral part of the lawyer-client relationship, and the Rules provide some measure of regulation of the profession in this regard.[34] This article does not deal with those instances where ordinary civil litigation, as distinguished from bar disciplinary proceedings, results in a case concerning attorney fees reaching the Mississippi Supreme Court.[35]

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[31] Miss. State Bar Ethics Op. 119 (1986).

[32] Miss. State Bar Ethics Op. 119 (1986).

[33] Miss. State Bar Ethics Op. 114 (1986).

[34] MSRPC Rule 1.5 (1987).

[35] *See, e.g.*, Lowrey v. Will of Smith, 543 So. 2d 1155, 1163 (Miss. 1989) (oral contingency fee contract with client on insurance claim not unreasonable).

A lawyer is required to communicate the basis of the fee to a client he has not regularly represented. This must be communicated within a reasonable time after the representation commences, and should be done in writing. It is not necessary that the fee be a quoted fixed sum at the front end. Instead, it may be merely an estimate and, like all estimates, subsequent events may alter it significantly. In such a case, the attorney should provide a revised estimate to the client.[36]

In calculating the fee, a lawyer may take into account a number of factors, most of which revolve around the time required, the complexity of the matter, and the expertise of the lawyer. Additionally, the determination may include fees customarily charged in the locality for similar matters, and whether it was apparent to the client that the lawyer would have to forego other employment in order to undertake the subject representation.[37]

The lawyer may also charge a contingent fee,[38] except in domestic relations matters where the payment of the amount is dependent upon obtaining the divorce or upon the amount of alimony or the size of the property settlement.[39] However, a lawyer is permitted to charge a contingent fee for the collection of past due alimony or child support. This is because these amounts become fixed and vested if unpaid when due. Thus, they are not, at that point in time, dependent upon obtaining a divorce, nor upon the amount of alimony or of the property settlement.[40] It is also a violation of the Rules to charge a contingent fee for representing a defendant in a criminal case.[41]

Even though a lawyer is prohibited from sharing fees with nonlawyers, except in very limited circumstances,[42] no violation of the Rules occurs when a medical expert is employed on a contingent fee basis where he will not testify, and where his fee comes from the client's recovery and not from the lawyer's fee.[43] This first proviso recognizes the policy determination that the testimony of a witness should not be subjected to the influences that would be present if the witness is to be paid from what, if anything, the party for whom he is testifying recovers or saves in the action.[44] The second proviso accommodates the rule noted above that a lawyer is not to share fees with a layman.

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[36] MSRPC Rule 1.5 comment (1987).

[37] *Id.* Rule 1.5(a) (1987).

[38] *Id.* Rule 1.5(a)(7) (1987).

[39] *Id.* Rule 1.5(d)(1)(1987).

[40] Miss. State Bar Ethics Op. 88 (1983).

[41] MSRPC Rule 1.5(d)(2) (1987).

[42] *Id.* Rule 5.4(a) (1987).

The Ethics Committee of the Mississippi State Bar has recently held that the Rules are not violated for a lawyer, whose fee was to be a portion of the value of land involved in the litigation, to accept a deed of trust on the land to secure his fee.[45] The concern was that this would violate Rule 1.8(j) - the conflict of interest prohibition against a lawyer acquiring an interest in the subject matter of the litigation.[46] The Committee noted that a lawyer is allowed to acquire a lien permitted by law to secure his fee, and may accept a case on a contingent fee basis. The committee further reasoned that the authority to acquire a lien "permitted by law" might mean that no other lien (such as a deed of trust) could be acquired, or it might mean that the door was slightly ajar insofar as the acquisition of such security interests is concerned. In opting for the latter interpretation, the Committee noted that while obtaining such a lien is not a per se violation of the Rules, the potential for conflicts of interest are great in these situations.[47]

At the time the Committee formulated the above discussed opinion, it was considering another instance of the interplay between Rule 1.8(j) and the contingent fee. Specifically, the question raised was whether a lawyer who had taken an assignment of a portion of the cause of action could ethically join as a coparty with his client in pursuing the matter. The Committee assumed that the assignment represented the lawyer's contingent fee and held that the Rules recognize the contingent fee agreement itself as a proprietary interest in the client's cause. This, of course, is expressly permitted by the Rules.[48] The Committee concluded, however, that an attorney, whose interest in the outcome of the litigation is solely due to the contingent fee, should not join in as a party.[49]

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[43] Miss State Bar Ethics Op. 91 (1984) (citing ABA Informal Op. 1375 (1976)).

[44] *See, e.g.*, Sherman v. Burton, 165 Mich. 293, 130 N.W. 667, 667-68 (1911) (contract to pay testifying physician contingent fee was void against public policy since testimony might be tainted).

[45] Miss. State Bar Ethics Op. 157 (1988).

[46] MSRPC Rule 1.8(j) (1987).

[47] Miss. State Bar Ethics Op. 157 (1988).

A matter of fairly recent concern in Mississippi involves the contingent fee in the case of a structured settlement. In a 1984 opinion, the Ethics Committee of the Mississippi State Bar answered two questions concerning these arrangements.[50] After admonishing the bar to make certain that these matters are agreed upon in advance, the Committee opined that a lawyer is not entitled to share in a client's future earnings except in unusual circumstances. Therefore, the lawyer should take his fee as a lump sum, and not as a portion of each payment received by the client throughout the lifetime of the arrangement. The Committee further stated that a lawyer can insist that the settlement include his lump sum fee if he and the client have agreed to this beforehand. But if there is no such agreement, the lawyer cannot insist on a lump sum fee if this will endanger the possibility of settlement.[51] The opinion leaves this area a bit unsettled as it speaks in terms of what should be and somehow manages to skirt clear directives on what is permitted and what is not.[52]

F. Conflicts of Interest

Because lawyers are fiduciaries we owe a high degree of loyalty to our clients. Because we owe a high degree of loyalty to our clients we constantly face the potential for conflicts of interest. With the large firm, a possibility of conflict always exists due to the activities of two or more lawyers, none of whom know what the others are doing. While all firms have procedures to lessen the possibility of undertaking prohibited representations, the potential for error is ever present. With any lawyer a question many times arises concerning when a present client, who cannot be opposed by the lawyer, becomes a former client who can be. In this portion of the article I will examine the conflicts of interest situation as it has developed in Mississippi.

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[48] MSRPC Rule 1.8(j)(2) (1987).

[49] Miss. State Bar Ethics Op. 159 (1988). The Committee acknowledged that there was room for argument as to whether a lawyer in such a situation was a proper or a necessary party. However, this was dismissed as a legal issue to be resolved by a court if it should arise, and the Committee was only concerned with ethical matters.

[50] Miss. State Bar Ethics Op. 92 (1984).

[51] Miss. State Bar Ethics Op. 92 (1984).

[52] This is not intended as a criticism of the Committee. I was one of its members when this opinion was adopted and we were feeling our way insofar as structured settlements were concerned.

Under the Rules, the notion of conflicts of interest embraces several diverse areas of activity. The first of these is that the lawyer may not enter into a representation if his, or someone else's, interests will cause him to give the client less of an effort than properly required.[53] Next, a lawyer is prohibited from entering into several different types of transactions because his interests and a clients may be brought into conflict.[54] Finally, the lawyer may not use the advantages afforded by a former representation in a way that might harm the former client.[55]

As a general proposition, if a lawyer owes his or her allegiance to one client that lawyer may not undertake another representation that is directly opposed to that client. However, the second representation may be permitted if the lawyer reasonably believes that the representation will not adversely affect the "relationship" with the first client, and both clients consent after consultation.[56] Also, a lawyer may not undertake a representation if it will be materially limited by his or her responsibilities to another client or a third person, or by the lawyer's own interests. However, the lawyer may proceed if he or she reasonably believes that the representation will not be adversely affected, and the client consents after consultation.[57] The standard imposed on the lawyer's belief that the conflict will not adversely affect the relationship is that determination which a disinterested lawyer would reach.[58] Of course, it is not always realistic to expect an attorney with a personal interest, such as the need for the business,[59] to make a fair appraisal of how a disinterested attorney would view the matter. While client consent is required in addition to the lawyer's evaluation of the matter, suffice it to say that some clients are stronger and more sophisticated than others.

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[53] MSRPC Rule 1.7 (1987).

[54] *Id.* Rule 1.8 (1987).

[55] *Id.* Rule 1.9 (1987).

[56] *Id.* Rule 1.7(a) (1987). It seems to me that the concern should not be whether the "relationship" is adversely affected, but should be whether the first client is so affected.

[57] *Id.* Rule 1.7(b) (1987).

[58] *Id.* Rule 1.7 comment (1987).

A word of caution is in order. The Rules, Ethics Opinions, and decisions discussed here involve the problem of lawyer discipline. They do not necessarily constitute the standard for disqualification of a lawyer by the court. Conversely, the fact that a lawyer has been disqualified by the court on a finding of conflict of interest should not, by itself, constitute the basis for a finding of a violation of the Rules.[60] In any event the trial court governs disqualification proceedings, while the bar punishes the errant attorney through its disciplinary procedures.

In an opinion construing the Code of Professional Responsibility, the Ethics Committee noted that two factors must be considered when deciding whether, as a matter of ethics, an attorney may undertake a representation adverse to a former client.[61] First, the lawyer may not use matters learned in a confidential relationship to the detriment of the client who revealed them.[62] Second, the attorney must avoid the appearance of impropriety. The latter was explained as reflecting the bar's concern that some conduct that might not be unethical would appear to the public to be so. In other words, the concern was with the general perception of the legal profession and judicial system, and any effect on the public's confidence in them. It must be noted that this part of the opinion involved an application of Canon 9 of the Code of Professional Responsibility which read "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."[63] When the Rules replaced the Code in 1987, this was not included.

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[59] *Id.* 1.7 comment (1987).

[60] While this discussion may take a position not spelled out in the Rules, it is supported by a comment in the preamble of the Rules. Under the heading of "Scope" the preamble says that violation of a Rule should not give rise to a cause of action nor create a presumption that a legal duty has been breached. This clearly is relevant in regard to malpractice actions, and is probably relevant to the point being made at this juncture in the text. However, in Spragins v. Huber Farm Service, Inc., 542 F. Supp. 166, 171 (N.D. Miss. 1982), a diversity action, the court stated that the issue of attorney disqualification involved an ethical, not a legal, question. The stated effect of this ruling was that the court looked to the Code of Professional Responsibility and controlling precedent that interpreted it for authority on the issue. But note that this case was decided before the adoption of the Rules of Professional Conduct and its preamble by the Mississippi Supreme Court in 1987.

[61] Miss. State Bar Ethics Op. 90 (1984). *See also*, Miss. State Bar Ethics Op. 106 (1985) (major issues concerning subsequent representation questions).

[62] *See supra* notes 24-30 and acommpanying text.

The opinion set out a rule of thumb that transcends any difference in the two regulations when it stated that a lawyer is not required to disqualify himself unless the terminated employment had some "substantial relationship" with the current representation, or unless he or she had received privileged information that could be used against the former client on behalf of the new one. The Code of Professional Responsibility, in dealing with client confidences, spoke in terms of "confidences" and "secrets," with the former being defined in terms of the evidentiary privilege.[64] The Rules of Professional Conduct, on the other hand, speak in terms of "information relating to the representation of a client."[65] There is no reason to think that the Ethics Committee, in using the term "privileged information" was limiting the scope of its opinion to "confidences" as the Code defined the term.

The Mississippi Supreme Court imposed a public reprimand on an attorney who, while serving as county attorney allowed to engage in a private practice of law, undertook to represent three school board members who were fighting to avoid being removed from office.[66] They were accused of accepting kickbacks for a school renovation project. The court reasoned that they were likely subjects for criminal proceedings at some point in the future, and that the attorney had rendered himself unable to prosecute them due to his representation of them in the removal proceedings. The court characterized the county/state as being the client entitled to the lawyer's primary allegiance.[67]

The adoption of the irreconcilable differences divorce procedure by the Mississippi Legislature[68] raised a problem in that some members of the bar believed a lawyer could represent both sides in that type of divorce action. The Ethics Committee was presented with that question and ruled that such a representation would constitute a conflict of interest.[69]

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[63] MSCPR Canon 9 (1971).

[64] MSCPR Canon 4 (1971).

[65] MSRPC Rule 1.6 (1987).

[66] Sanders v. Mississippi State Bar Assoc., 466 So. 2d 891 (Miss. 1985).

[67] *Sanders*, 466 So. 2d at 894.

Considerably different is the situation where an attorney seeks to oppose a present client in a completely unrelated matter. Clearly neither of the factors noted in the preceding paragraph is likely to be present in this situation. Nevertheless, the Ethics Committee ruled that the representation could not be undertaken and relied on the idea that loyalty to the client demands that the client not be concerned about the lawyer's devotion to his cause.[70]

A plethora of ethics opinions in this area has been generated by public, or quasi public, employment of one or more members of a law firm. Thus, the Ethics Committee has ruled that neither the spouse, parent, child or sibling of a district attorney or assistant district attorney may represent persons charged with felonies in that particular district;[71] that an attorney who represents criminal defendants on appeal from city court may not simultaneously act as special appeals prosecutor for the city in cases he was not appealing;[72] a municipal judge pro tem and members of his firm may not represent defendants in cases in which he has not participated in that court, but they may represent such defendants in circuit court;[73] a former judge may not represent a person in a petition for a pardon where the judge presided over the trial where the petitioner was convicted of a felony;[74] the partner of the city attorney may not represent a party seeking an exception to the provisions of a city ordinance;[75] and a city attorney may not represent a plaintiff in an action against a city-county hospital, particularly where he will have to argue against sovereign immunity.[76] These constitute but a few of the opinions finding that a conflict exists. It is interesting to note that they do not all examine the danger of the disclosure of client confidences, nor are they necessarily based on the now abandoned idea of the appearance of impropriety. Instead, it seems that the client's justifiable apprehension is probably the controlling factor in many of these decisions.

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[68] Miss. Code Ann. § 93-5-2 (Supp. 1990).

[69] Miss. State Bar Ethics Op. 80 (1983); *see* Supplement to Miss. State Bar Ethics Op. 80 (1983) (representation in no-fault divorce cases in Mississippi). The supplement resulted from a public hearing on the original opinion requested by some members of the bar, including the author of the legislation. It did not change the original opinion. The foregoing history is based on my personal recollections as I was a member of the Ethics Committee at the time.

[70] Miss. State Bar Ethics Op. 103 (1985); Miss. State Bar Ethics Op. 69 (1982); Miss. State Bar Ethics Op. 52 (1980).

[71] Miss. State Bar Ethics Op. 140 (1987). The disqualification specifically was not extended to misdemeanors that did not fall within the jurisdiction of the District Attorney's office.

[72] Miss. State Bar Ethics Op. 142 (1988); *see* Miss. State Bar Ethics Op. 63 (1981) (member of firm that represents city, as city attorney and as city prosecutor, may not represent criminal defendant on charges that are pursued by law enforcement agencies of city); Miss. State Bar Ethics Op. 116 (1986) (city attorney may represent criminal defendants before grand jury and in other courts so long as no interests of city are involved).

On the other hand, the Ethics Committee did not find a conflict of interest where an attorney regularly employed by the county board of supervisors represented criminal defendants in the county;[77] it ruled that it was permissible for the attorney for the board of supervisors to execute a written opinion upholding the legality of a business transaction with the county even though the opinion was prepared by the other party, provided the attorney did not represent the party preparing the opinion, and also provided that the attorney concurs in its conclusions.[78] The Ethics Committee also held that an associate in a law firm may serve on the city civil service commission even though the firm has in the past, and may in the future, represent the city.[79]

A somewhat parallel situation may exist where an attorney seeks to represent two parties aligned on the same side in a case. The Mississippi Supreme Court has held that there is nothing wrong with an attorney representing two clients in a case so long as their interests run parallel.[80] In the case, the two parties were an insurance company and its insured. The court ruled, however, that when their interests became divergent, the fact that the insurance company had a contract with the insured permitting the dual representation did not lessen the duty the attorney owed to the insured as his client. To avoid violating this duty, the attorney in this type of situation may have to terminate his representation.[81]

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[73] Miss. State Bar Ethics Op. 149 (1988).

[74] Miss. State Bar Ethics Op. 170 (1989).

[75] Miss. State Bar Ethics Op. 26 (1974).

[76] Miss. State Bar Ethics Op. 37 (1977).

[77] Miss. State Bar Ethics Op. 31 (1975).

[78] Miss. State Bar Ethics Op. 165 (1989).

[79] Miss. State Bar Ethics Op. 169 (1989).

[80] Hartford Accident & Indem. Co. v. Foster, 528 So. 2d 255, 268 (Miss. 1988); *see*

According to the Rules, a lawyer may not enter into a business transaction with a client unless the arrangement is made on terms that are fair and reasonable to the client, the client is given a reasonable opportunity to seek the advice of independent counsel, and the client consents to the arrangement in writing.[82] Of course, this does not apply to standard commercial transactions such as brokerage services, the sale of products manufactured by the client, utility services and the like.[83]

Lawyers may not draft an instrument whereby the client makes a gift to the lawyer unless the parties are related, but this does not mean that a lawyer may not accept a gift from a client under any circumstances.[84] The test is whether the making of the gift meets general standards of fairness, and precludes the lawyer drafting an instrument effectuating the gift.

A prohibition also exists against a lawyer obtaining literary or media rights from the client prior to the termination of the representation.[85] Of course, this can create a significant conflict of interest in the right situation. For instance, if a lawyer represents a defendant in a sensational murder case, the media rights may be much more valuable if the client is convicted than they would be if he is acquitted. Also, if the defendant is executed, this may stir more interest in the future presentation of the story than would be the case if he merely went to prison.

A recurring problem experienced by the plaintiff's bar is

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also Miss. State Bar Ethics Op. 43 (1977) (upheld practice of one attorney representing both insurance company and claimant in action against third party, provided that both clients retain and compensate lawyer).

[81] *Hartford*, 528 So. 2d at 268.

[82] MSRPC Rule 1.8(a) (1987).

[83] *Id.* Rule 1.8 comment (1987).

[84] *Id.* Rule 1.8(c) and comment (1987).

[85] *Id.* Rule 1.8(d) (1987).

that of advancing financial assistance to a client. The Rules allow a lawyer to advance court costs and the expenses of litigation with repayment contingent on winning the case, or the lawyer may simply pay them for an indigent client with no agreement for repayment.[86] The problem faced by many plaintiff's lawyers involves the poor client who needs money to live on or with which to pay his hospital bills. Such an individual is ready prey to an unscrupulous defendant who offers the enticement of an immediate settlement for a modest amount, where the alternative is a protracted delay with an uncertain recovery in the offing. To date the Rules do not provide any guidance on this matter other than to prohibit financial assistance to the client except in the situations noted above.

Lawyers may not accept their fees from third parties unless the client consents, there is no interference with the lawyer's independent judgment on behalf of the client, and information gained through the representation is protected under the rules for client confidentiality.[87] This can be particularly difficult where a minor's mother and father employ a lawyer to represent their child in a matter in which the child has not been completely honest with his parents. Nevertheless, the lawyer must recognize that the child is the client and his or her disclosures are protected by the Rules.

If a lawyer's spouse, parent, child or sibling is also a lawyer, the Rules prohibit their undertaking representations that are directly adverse to each other unless the affected clients knowingly consent.[88] The Ethics Committee had occasion to consider an opinion request specifically limited to husband and wife being members of different law firms which are on opposing sides of a matter. The resulting opinion[89] is rather long and covers three possible scenarios.

First, the opinion[90] holds that where both are actively working on the case there is no per se disqualification. In other words, the clients may agree to the representation. The opinion does point out that a conflict could develop because of the emotional bond between husband and wife, or because of financial need. As an example, if one firm has the case on a contingent fee and the other is hired by the hour, husband and wife could get what amounts to a double recovery if the contingent fee firm prevails. The second scenario is where only one spouse actively works on the matter. Clearly, if no per se disqualification exists under the first scenario, there will be none under this one. Again the opinion expresses concern over the possibility of conflict due to economic factors relating to the lawyers, but it expressly negates the necessity for building a "chinese wall" between the non-participating spouse and his or her firm. Third, the opinion finds no problem where neither spouse works on the matter.

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[86] *Id.* Rule 1.8(e) (1987).

[87] *Id.* Rule 1.8(f) (1987).

[88] *Id.* Rule 8.1(i) (1987).

[89] Miss. State Bar Ethics Op. 112 (1986).

[90] Throughout the discussion of this opinion, I will refer to the provisions of the "opinion" rather than make reference to the conclusions of the "Committee." This is because the Committee was unable to write an opinion acceptable to the Board of Bar

All of the foregoing is predicated on the client's consenting to the representations after being informed of the potential for conflict. If the client of either firm objects then that client's lawyers must withdraw. In other words, the rule does not permit one side to veto the other side's choice of counsel.

Under the Rules, the standard for imputed disqualification seems to be more narrowly drawn than it was under the Code of Professional Responsibility.[91] Essentially, no lawyer in a firm may represent a client if anyone in the firm could not because of conflicting personal interests of the lawyer or the interests of another client, because of the prohibition of drafting an instrument making the lawyer a gift, or because of a conflict with a former client.[92] Additionally, when a lawyer joins a firm, that firm will be disqualified from representing a client in the same or a substantially related matter in which that lawyer, or his previous firm, had represented the opposing side and the lawyer had acquired information about that side protected by the Rules.[93]

Commissioners, so an ad hoc committee of the Board drafted this opinion.

[91] *Compare* MSRPC Rule 1.10 (1987) (imputed disqualification general rules) *with* MSCPR DR 5-105 (1971) (refusing to accept or continue employment if interest of another client may impair judgment of lawyer).

[92] MSRPC Rule 1.10(a) (1987).

[93] *Id.* Rule 1.10(b) (1987).

A related rule will be discussed here even though it does not necessarily involve a conflict of interest. It is relevant to this portion of the paper because it results in disqualification of a lawyer. The rule provides that a lawyer may not represent a party in litigation if the lawyer is likely to be a necessary witness.[94] The lawyer, however, is not disqualified because another member of his or her firm is likely to be called as a witness.

G. *Declining or Terminating Representation*

The American lawyer has no legal duty to undertake any particular representation. Unlike the British barrister, he is not viewed as a cabman on the rank.[95] Once the representation has commenced, unless a court orders otherwise, a lawyer shall withdraw if his continued representation will result in a violation of the Rules, he is physically or mentally unable to carry out the representation, or he is discharged.[96] Subject to a contrary order by a court, a lawyer may withdraw from a representation if such can be done without material adverse effects on the client, or the client conducts himself in some unacceptable manner in regard to the representation, or the representation imposes an unreasonable financial burden on the lawyer, or there is some other good reason for the withdrawal.[97] Of course, when a lawyer does withdraw he or she has a duty to safeguard the interests of the client.[98]

IV. THE ADVOCATE

A. *Meritorious Claims and Contentions*

The lawyer functioning as an advocate is admonished to avoid bringing frivolous suits or defending frivolous positions.

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[94] *Id.* Rule 3.7 (1987).

[95] *See, e.g.*, Zander, *The Thatcher Government's Onslaught on the Lawyers: Who Won?*, 24 THE INT'L LAW. 753, 780-81 (1990).

[96] MSRPC Rule 1.16(a) (1987).

[97] *Id.* Rule 1.16(b) (1987).

[98] *Id.* Rule 1.16(d) (1987); *see also* Myers v. Mississippi State Bar, 480 So. 2d 1080, 1092 (Miss. 1985) (court held that attorney could not withdraw from case merely by reaching agreement to that effect with his client since attorney has duty to continue representation until such time as he is relieved by court).

This is quite apart from the prohibitions of Rule 11 of the Mississippi (and Federal) Rules of Civil Procedure. The Rules do provide that when defending one charged with a crime, the lawyer may require the state to prove every element of the offense.[99]

B. Candor Toward the Tribunal

Lawyers are required to demonstrate candor to the tribunal. This not only includes making full and accurate disclosures of fact as appropriate,[100] but also means that the lawyer must inform the court of controlling authority in the jurisdiction even if it is adverse to his position provided counsel opposite has not cited it.[101] A lawyer is forbidden to present evidence that he or she knows to be false, and may refuse to offer evidence that he or she believes to be false.[102]

A special problem arises in regard to the defendant in a criminal action who desires to testify, and the lawyer believes that the client will commit perjury. The Rules note three suggested approaches, but do not mandate any of them.[103]

One such approach is to let the client testify in a narrative manner without the lawyer questioning him as to the matters he brings up. Of course, this will alert the jury that something unusual is going on because no other witnesses have been treated in this fashion. The judge should realize why the testimony has been handled in this fashion, and the impact may be a more harsh sentence in the event the defendant is convicted.

A second idea is to relieve the attorney of the duty to reveal his client's perjury. This presents him with the dilemma of either being a party to perjury or not giving his client a zealous representation. Many lawyers would find that to be a distasteful choice, and sooner or later someone would be subject to a bar investigation on a complaint that he refused to introduce perjured testimony even though he ethically could.

The third choice is to require that the lawyer disclose the perjury to the extent necessary to rectify the situation. This has the effect of denying the client full assistance of counsel or of the right to testify in his own behalf.

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[99] MSRPC Rule 3.1 (1987).

[100] *Id.* Rule 3.3(a)(1),(2) (1987).

[101] *Id.* Rule 3.3(a)(3) (1987).

[102] *Id.* Rule 3.3(a)(4) and 3.3(c) (1987).

[103] *Id.* Rule 3.3 comment (1987).

There is no good solution to the problem. Either the lawyer aids in the introduction of perjured testimony or he aids in the conviction of the client he is supposed to defend.

C. *Fairness to Opposing Party and Counsel*

Having a rule that requires lawyers to play fairly is probably an indictment of our profession. However, the more that I see our profession in action, the more that I understand that such a rule is needed.

Lawyers may not engage in conduct that would tend to deprive the opponent of a fair trial.[104] This includes hiding witnesses or other evidence, falsifying evidence, making frivolous discovery requests, failing to respond to legitimate discovery requests, attempting to testify by way of argument, and requesting others to refrain from voluntarily giving relevant information.[105]

D. *Trial Publicity*

Freedom of the press and the right to a fair trial clash where there is an effort to restrict trial publicity. The Rules prohibit a lawyer from making an extrajudicial statement that is likely to be disseminated and is likely to materially prejudice an adjudicative proceeding.[106] The Rule then proceeds to enumerate six types of statements that are likely to prejudice a civil case tried to a jury or any criminal matter.[107] These are statements that relate to matters of character or credibility; the likelihood of a guilty plea, or the contents of any admission or confession; matters concerning examinations or tests; opinions as to guilt or innocence; matters that would be inadmissible at trial and that would possibly prejudice a fair trial if admitted; and the fact that a defendant has been charged with a crime unless the statement explains that a charge is merely an accusation and must be proven in court.[108] Obviously, most of the above are more relevant to criminal than to civil proceedings.

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[104] *Id.* Rule 3.4 (1987).

[105] *Id.*

[106] *Id.* Rule 3.6(a) (1987).

[107] *Id.* Rule 3.6(b) (1987).

Despite the foregoing prohibitions on speech, the Rule does permit the disclosure of information of a general nature, and permits the disclosure of information that might be useful in protecting society or in apprehending a criminal.[109]

The rule as originally included in the Code of Professional Responsibility was much more restrictive on speech than it is today.[110] In 1984, at the urging of the American Civil Liberties Union, the Ethics Committee studied the matter and recommended that the rule be amended to read very much as it does now. This recommendation was adopted by the Mississippi Supreme Court that year.[111]

As the comment to the Rule points out, no body of rules fully satisfies the sometimes antagonistic interests in a fair trial and in freedom of expression.[112] Nor can anyone be certain that a rule drafted with this particular Scylla and Charybdis in mind will pass constitutional muster. However, the Rule as presently written seems to be more likely to succeed than did its predecessor.

E. The Prosecutor

The prosecutor is not a totally partial advocate. While she has a duty to play her part in enforcing the criminal laws of the jurisdiction, she also has a duty to protect the rights of the defendant and to see to it that the case is conducted according to the many rules that may govern criminal proceedings.[113] In considering this area we must remember that the Rules are among those laws that govern lawyers, including prosecutors, while the question of a fair trial is a constitutional or statutory issue. In theory at least, it would be possible for a prosecutor to violate either one without violating the other.

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[108] *Id.* Rule 3.6(b)(1987).

[109] *Id.* Rule 3.6(c) (1987).

[110] *See* MSCPR DR 7-107 (1971) (lawyer may not make extrajudicial statement disseminated by public which states more than information in public record, fact that investigation in progress and scope of investigation generally).

[111] The historical background noted above is derived from the circumstance that the Honorable Hubbard T. Saunders and I were neophyte members of the Ethics Committee at this time, and it fell our lot to research and draft the proposed amendment that the court subsequently adopted.

[112] MSRPC Rule 3.6 comment (1987).

[113] *Id.* Rule 3.8 comment (1987).

In addition to the other rules that govern the professional conduct of all lawyers, the prosecutor is subject to a special rule directed to her sphere of activity.[114] Basically, this rule calls for the prosecutor to ensure a fair trial by safeguarding the constitutional rights of the defendant.

As an example, the prosecutor may not seek a waiver from an unrepresented defendant of important pretrial rights. But this does not apply in the case of one who is proceeding *pro se* with the approval of the court.[115]

The rule specifically calls for the prosecutor to make timely disclosure to the defense of all evidence or information that would tend to negate the guilt of the accused.[116] Sometimes it is difficult for a prosecutor to bring herself to do this because of the nature of the case or her belief in the guilt of the defendant. However, the rule is clear and she must put her personal feelings aside and do her duty within the confines of the law.

V. TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

This portion of the Rules does not warrant significant discussion. Basically, it provides that a lawyer must be truthful in statements to others which are uttered in the course of representing a client,[117] a lawyer may not communicate with one represented by counsel unless he has the consent of the other lawyer,[118] and in dealing with those who are unrepresented by counsel the lawyer may not state or imply that he is disinterested.[119]

A lawyer may communicate with one who is unrepresented, even though that person is, or wili be, the subject of litigation and will eventually be represented by counsel.[120] An example is the automobile accident case where the defendant will be defended by an insurance company. The attorney must scrupulously obey the requirement that she not let the unrepresented party believe that she is disinterested, and she may not give such party any legal advice.[121]

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[114] *Id.* Rule 3.8 (1987).

[115] *Id.* Rule 3.8(c) comment (1987).

[116] *Id.* Rule 3.8(d) (1987).

[117] *Id.* Rule 4.1 (1987).

[118] *Id.* Rule 4.2 (1987).

[119] *Id.* Rule 4.3 (1987).

[120] Miss. State Bar Ethics Op. 141 (1988).

VI. Law Firms and Associations

A. Responsibility for Adherence to Rules

Law firms are not simply a collection of individuals who practice law, for they have a specific existence apart from their members and associates. The law firm, acting through "a partner," has the responsibility to see that measures are in place to ensure that all lawyers in the firm comply with the Rules, and those supervising others have the duty to see to it that the supervised conform.[122] The comment suggests that, while an occasional admonition might be sufficient in a small firm, large firms probably need to institute procedures whereby questions of ethics might be raised and formally resolved.[123]

One lawyer can be held responsible for another lawyer's violation of the Rules if the first lawyer orders or approves it, or if the first has supervisory responsibility over the one in breach.[124] Other than these two situations, the only place where the Rules hold one lawyer responsible for the ethical misdeeds of another is where the one induces or assists the other in a violation.[125] The mere fact that the supervisory attorney may be held responsible for a subordinate's misconduct does not necessarily insulate the junior lawyer from discipline, but he may be protected if he acts on his superior's reasoned resolution of an arguable question of ethics.[126]

The law firm, again acting through a partner, has the duty to ensure that the conduct of nonlawyer assistants is compatible with the provisions of the Rules. The partners in the firm, as well as the lawyer supervising the nonlawyer, may be held responsible for the latter's conduct.[127] This solves the problem that would otherwise be created by the fact that nonlawyers are not directly subject to the bar's disciplinary authority.

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[121] Miss. State Bar Ethics Op. 141 (1988).

[122] MSRPC Rule 5.1(a),(b) (1987).

[123] *Id.* Rule 5.1 comment (1987).

[124] *Id.* Rule 5.1(c) (1987).

[125] *Id.* Rule 8.4(a) (1987).

[126] *Id.* Rule 5.2 (1987).

B. Professional Independence of a Lawyer

A lawyer is prohibited from sharing fees with a nonlawyer except in a few situations. A lawyer and a law firm are permitted to enter into an agreement calling for the firm to pay money to a laywer's estate or to designated persons during a reasonable period of time after the lawyers death. Of course, where a lawyer completes the unfinished business of a deceased lawyer, the decedent's estate is entitled to compensation for the work which he had performed and for which he had not been paid at the time of the distribution. Also, a firm may include nonlawyer employees in compensation or retirement plans, even those that are based in some part on profit sharing.[128] On the other side of this particular coin, a lawyer may not enter into an arrangement whereby he closes loans for a mortgage company, receives a flat fee from the company and keeps the remainder of the amount charged to the borrower as attorneys fees.[129]

Lawyers may not form partnerships with nonlawyers if any of the partnership activities consist of practicing law, and lawyers may not allow nonlawyers to invest in their law firms.[130]

It is human nature for a person who pays the bills to feel that she has the right to direct the operation, and in many situations this is appropriate. Of course, such person should be prepared to accept the consequences of her folly. However, this is not permissible in the lawyer-client situation. The lawyer may not permit the one who recommends, employs or pays her to control her professional judgment in regard to the conduct of the representation.[131] This can create a difficult situation when it arises with a strong-willed client, but it can be particularly acute when a parent employs a lawyer to represent that parent's child in a criminal or youth court matter. The lawyer must remember that the child, not the parent, is the client, and that the duty of confidence and loyalty is owed to the child.[132] We must remember that, while the lawyer must exercise her professional judgment in deciding how the representation will be conducted, it is the client who decides on its objectives of the representation.[133]

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[127] *Id.* Rule 5.3(a), (b) (1987).

[128] *Id.* Rule 5.4(a) (1987).

[129] Miss. State Bar Ethics Op. 33 (1976).

[130] MSRPC Rule 5.4(d)(1) (1987) (exception exists when non-lawyer fiduciary representative of decedent lawyer's estate holds decedent's interest in firm for reasonable time during administration of estate).

[131] *Id.* Rule 5.4(c) (1987).

C. *Unauthorized Practice of Law*

Of course lawyers' may not themselves engage in the unauthorized practice of law. This occurs when a lawyer admitted to practice in one jurisdiction unlawfully engages in practice in another.[134] Equally apparent is the rule that we may not assist others to engage in such practice.[135]

The Mississippi Code provides that the filing of pleadings or other documents in a case, or giving advice therein, as well as the drafting of several other types of documents without the benefit of a license constitutes the unauthorized practice of law. Interestingly, the code definition calls that these activities be done "for fee or reward or promise, directly or indirectly."[136] In what is apparently its only decision dealing with this subject,[137] the Mississippi Supreme Court held that the matters enumerated in the statute were neither all inclusive nor all exclusive, and defined the practice of law as being "any exercise of intelligent choice in advising another of his legal rights and duties. . . ."[138] Furthermore, the court held that the practice of law did not necessarily involve the charging of a fee for the service.[139]

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[132] No lawyer should ever forget that the parent is probably distraught and frightened. There are various ways to handle the inevitable request for confidential information, and it is to be hoped that the lawyer will adopt one that includes a measure of compassion.

[133] MSRPC Rule 1.2(a)(1987).

[134] It is a violation of the Mississippi Rules for a Mississippi lawyer to practice in a jurisdiction where he or she is not authorized to do so. MSRPC Rule 5.5(a) (1987). *See* MSRPC Rule 8.5 (1987) (proposition that rules violated if Mississippi lawyer engaged in practice elsewhere violates Rules of other jurisdiction).

[135] MSRPC Rule 5.5 (1987).

[136] MISS. CODE ANN. § 73-3-55 (1972).

[137] Darby v. Mississippi State Bd. of Bar Admissions, 185 So. 2d 684, 687 (1966). The style of the case should alert one that disciplinary procedures today differ considerably from those in place at the time of *Darby*.

While a paucity of case law exists on the subject of unauthorized practice, there are a few ethics opinions that in some way may help illuminate the matter. In one of these opinions the Ethics Committee was asked if a lawyer could prepare form collection letters and then turn them over to his client for mailing by the client whenever he was pursuing a delinquent account. Rather than being totally form letters, they would contain blanks that the client would fill in and thereby identify the debtor, account, and amount in arrears. Also, the letters threatened legal action if the accounts were not brought current. The letters would be signed by the attorney when he turned them over to the client, and would be mailed in the attorney's envelopes. The Committee ruled that this would constitute assisting a nonlawyer in the practice of law.[140]

In a subsequent opinion this earlier ruling was distinguished. The Committee was called on to decide whether this same rule was violated if a bank sent out demand letters over the signature of one of its staff attorneys directing the customer in default to communicate with a layman who was a member of the collection department. The Committee noted that the earlier opinion contemplated the attorney signing the letters in blank and turning them over to the client, while the bank in the matter under consideration did not contemplate such a procedure. Accordingly, the proposed course of action was found to be acceptable.[141]

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[138] *Darby*, 185 So. 2d at 687.

[139] *Id.*

[140] Miss. State Bar Ethics Op. 25 (1974). Unfortunately, the opinion does not explain the Committee's ruling. *See also* Miss. State Bar Ethics Op. 32 (1975) (prohibits lien company from collecting Attorney Fee in justice court when attorney not personally involved).

[141] Miss State Bar Clarification of Ethics Op. 25 (1980). The Committee found no problem in referring the customer to a layman in the collection department because EC 3-6 condoned a law office delegating tasks to clerks, secretaries, and other lay persons. No provision in the Rules compares exactly with this, but such is to be inferred from Mississippi Rule 5.3 (1987).

The Ethics Committee has ruled that a lawyer who is suspended from the practice of law or who is disbarred may not work as a paralegal or legal assistant in an attorney's office. In reaching this conclusion, the Committee accepted the proposition that the line of demarcation between these activities and "Those functions that can only be performed by an attorney is not always clear and distinct."[142] In a clarification of that opinion, the Committee held that where a lawyer has been reinstated conditioned on his passing the bar examination and the multistate professional responsibility examination, he may not work as a clerk or paralegal until he has met all the requirements for reinstatement.[143] Of course, one unstated premise upon which these opinions rest is the fact that the lawyer will be engaged, or will be perceived to be engaged, in the practice of law when he is not authorized to do so.

VII. Information About Legal Services

A. Introduction

This portion of the Rules deals with two distinct concepts that have, in the minds of some people, become confused with each other. These are attorney advertising and the solicitation of business by lawyers. The confusion is only natural since either may be considered as an aspect of the other. However, the law governing lawyers clearly shows that advertising consists of the communication of the availability of representation, and at least some facts about the background of the lawyer, whereas solicitation consists of direct, or nearly direct, contact between the lawyer and one she seeks to represent, and which is initiated by or on behalf of the lawyer.[144]

There is a major conflict here between the first amendment and the profession's traditional attitude toward what constitutes proper decorum. Of course, there is inadequate evidence that the profession, as distinguished from the leaders of the organized bar, has any consensus on ideas of decorum. Regardless, the United States Supreme Court has found lawyer advertising constitutionally protected as commercial speech, thereby bringing into question the relevance of traditional attitudes about it.[145]

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[142] Miss. State Bar Ethics Op. 96 (1984) (citing In re Frank John Kuta, 427 N.E.2d 139 (Ill. 1981)).

[143] Miss. State Bar Ethics Op. 171 (1990).

[144] *Compare* Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed. 2d 810 (1977) (seminal case on lawyer advertising) *with* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475 (1981) (solicitation by mail), *and* Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed. 2d 444 (1978) (face to face solicitation) *and* In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed. 2d 417 (1978) (indirect solicitation by public interest lawyer).

The Rules permit communication by lawyers concerning the availability of their services, but prohibits false, deceptive or misleading statements.[146] A statement is considered to be false, deceptive or misleading if it contains a misrepresentation of fact or law, is likely to create unjustified expectations, or compares one lawyer's services or fees with those of another.[147]

B. Advertising

Lawyers are permitted to advertise, subject to the limits set forth in the preceding paragraph.[148] Even though a lawyer may advertise, he may not give anything of value to a person for recommending his services except for the reasonable cost of his advertisement.[149] This means that the lawyer may not pay persons, sometimes called "runners," to recommend his services to others. This restriction does not apply to hiring someone to produce, or appear in, an advertisement.

Advertisements may quote a fixed fee for certain services, and if they do, the advertisement must contain a statement that the requirements of the Mississippi State Bar are that the attorney not charge more for the service than he advertised.[150] An advertisement may list areas of law in which the lawyer performs or wishes to perform professional services. When such is a part of the advertisement, the lawyer must also include a statement that this does not indicate any certification of expertise in the area.[151]

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[145] *Bates*, 433 U.S. at 384.

[146] MSRPC Rule 7.1 (1987); *see Bates*, 433 U.S. at 383.

[147] *Id.* Rule 7.1 (1987).

[148] *Id.* Rule 7.2 (1987); *see also* Miss. State Bar Ethics Op. 86 (1983) (scope of permissible advertising).

[149] MSRPC Rule 7.2(c) (1987).

[150] *Id.* Rule 7.2(e) (1987).

Restrictions on advertising may be no more narrowly drawn than the Constitution permits, and with continuing judicial activity in this area, it is difficult to say which restrictions retain validity and which do not. As an example, the Ethics Committee has ruled that if a lawyer repeatedly receives laudatory publicity in a newspaper, he has a duty to attempt to bring about a cessation of this publicity.[152] However, it is difficult to see how the lawyer has a duty to act at all if he is not responsible for such statements appearing in the paper, and if they are not false. Of course, one will probably assume that the lawyer instigated the article by its mere presence in the newspaper. The Rules are clearly violated when a lawyer causes a laudatory story to appear in the newspaper.[153]

The Ethics Committee may have contradicted itself in three opinions in this area, but this is far from clear. First, the committee ruled that the Lieutenant Governor of the State may become a member of a law firm, the firm may use his name in authorized advertising and this presented no ethical dilemma.[154] Then, the Committee ruled that a lawyer who was also a licensed medical doctor may include the initials J.D./M.D., as well as his medical specialty, after his name on his business card and stationery. The Committee concluded that the Rules did not prohibit such action unless the information was false, deceptive or misleading.[155] Later, the Committee opined that it would be unethical for a lawyer who was a member of the military reserve to include initials indicating his reserve affiliation in advertisements published in a military installation's newspaper.[156] Here, they reasoned that this might lead the public to incorrectly believe that the lawyer enjoyed some degree of special competence. The opinion does not explain why this would be likely,[157] or why the dual legal/medical designation would not have the same result. Certainly most people are likely to identify the Lieutenant Governor of the State, and his presence might suggest to some persons that the firm could perform a number of services that an ordinary law firm could not perform. The opinion concerning the Lieutenant Governor is particularly puzzling in light of another opinion that held it improper for a lawyer to list past or present political offices or titles on his letterhead.[158]

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[151] *Id.* Rule 7.2(f) (1987).

[152] Miss. State Bar Ethics Op. 41 (1977).

[153] Miss. State Bar Ethics Op. 168 (1989).

[154] Miss. State Bar Ethics Op. 62 (1981).

[155] Miss. State Bar Ethics Op. 139 (1987).

[156] Miss. State Bar Ethics Op. 155 (1988).

[157] The designation, in my opinion, would say "I'm one of you" more than it would say anything else.

In an advertisement, a lawyer may not list areas of specialty except he may profess to be a patent lawyer if he is admitted to practice patent law before the United States Patent and Trademark Office, and he may also claim to be an admiralty lawyer if he is engaged in such a practice.[159] The Ethics Committee, basing its opinion on the Rules, has determined that a lawyer may not state that he is certified in civil trial advocacy or criminal trial advocacy by the National Board of Trial Advocacy.[160] The ruling was clear that a lawyer may list only patent and admiralty as areas of specialty.

However, last year the United States Supreme Court decided *Peel v. Attorney Registration and Disciplinary Commission of Illinois*,[161] which held that the State of Illinois could not constitutionally prohibit a lawyer from putting on his letterhead the notation "Certified Civil Trial Specialist By the National Board of Trial Advocacy." The Court found that this was neither false nor misleading, and stated that if the state was concerned about the certifying organization's credibility, it might consider screening the organizations, or requiring a disclaimer about them or the standards of a specialty.[162] Clearly *Peel* nullifies the Ethics Opinion mentioned in the preceding paragraph.[163]

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[158] Miss. State Bar Ethics Op. 64 (1981).

[159] MSRPC Rule 7.4 (1987).

[160] Miss. State Bar Ethics Op. 153 (1988).

[161] ___ U.S. ___, 110 S.Ct. 2281, 110 L.Ed. 2d 83 (1990).

[162] *Peel*, ___ U.S. at ___, 110 S.Ct. at 2292-93.

[163] Miss. State Bar Ethics Op. 64 (1981).

C. *Solicitation*

The Rules state that a lawyer may not solicit professional employment from anyone with whom he does not have a family, close personal or prior professional relationship.[164] The term "solicit" is defined as including "contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient." It does not include advertising circulars and the like.[165]

The rule clearly runs afoul of *Shapero v. Kentucky Bar Association*,[166] where the United States Supreme Court reversed a decision denying an attorney the right to solicit by mail a targeted audience.[167] Since the *Shapero* decision, the Ethics Committee has approved the sending of truthful and nondeceptive solicitation letters to potential clients known to be in need of legal services.[168] Even though the Rules have not been amended to reflect *Shapero*, the prohibition contained in the Rules is no longer of any force.

VIII. CONCLUSION

This article has been a brief study of the Rules of Professional Conduct as they exist in Mississippi. The treatment has not been complete, and I omitted a number of important rules that probably deserved reference and treatment. Among them are rules dealing with the safekeeping of client's property,[169] the entire group of rules relating to public service,[170] and the rule which requires that lawyers report instances of misconduct by their colleagues.[171]

The purposes of this article have been to give familiarity with the Rules to those who need it, and to provide a reference source to the bar. No one should consider that this work is so complete as to justify their abandoning their own study of the laws that govern lawyers. A word of caution is in order. Remember that new court decisions and new Ethics Opinions will soon render my effort obsolete.

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[164] MSRPC Rule 7.3 (1987).

[165] *Id.* Rule 7.3 (1987).

[166] 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed. 2d 475 (1988).

[167] *Shapero*, 486 U.S. at 480.

[168] Miss. State Bar Ethics Op. 158 (1988).

[169] MSRPC Rule 1.15 (1987).

[170] *Id.* Rules 6.1 through 6.4 (1987).

[171] *Id.* Rule 8.3 (1987).

PRESERVING THE PROFESSIONAL TRADITION

*John G. Corlew**

I. INTRODUCTION

The legal profession has experienced dramatic change in recent years. From 200,000 in 1950, the number of lawyers in the United States has grown to 800,000, the largest legal profession in the world, both in absolute numbers and in proportion to population.[1] From 2,265 in 1970, the number of lawyers in Mississippi has more than doubled to 4,800 lawyers in 1990.[2] In contrast, the population increased during the same period from 2,216,912 to 2,573,216 so that the ratio of lawyers increased from one per every 979 persons in 1970 to one per every 536 persons in 1990.[3]

Accompanying the tremendous growth in the number of lawyers has been a substantial change in the roles lawyers perform and the structures within which they practice. From a profession of primarily independent private practitioners, the legal profession includes an increasing proportion of lawyers who work as corporate counsel, civil servants, judges, prosecutors, public defenders, legal aid lawyers, code enforcers and legal educators. The expansion of the size of law firms and increase in the number of lawyers outside private practice has resulted in nearly half of the lawyers in the United States having the status of employee rather than independent practitioner.[4] The growth in number, and the changes in structure, have changed the traditionally accepted modes of practicing law and diminished the informal social controls that a smaller, more homogenous bar once exerted.[5] Professor Deborah L. Rhode observes that approximately two-thirds of the American bar now work within organizations of some sort and perform the bulk of their services for entities rather than individuals. As a result, the attorney often is not the independent practitioner which the public may perceive him to be, "but an employee with circumscribed responsibility, organizational loyalty and attenuated client contact."[6]

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* Partner, Watkins & Eager; Jackson, Mississippi, B.A., 1965, University of Mississippi; J.D., 1968, Vanderbilt University.

[1] R. L. ABEL, AMERICAN LAWYERS 1 (1989); Chauvin, *Professionalism: Yesterday, Today and Tomorrow*, 15 OHIO N.U.L. REV. 635, 636 (1988); White, *Professionalism and the Law School*, 19 CUMB. L. REV. 309, 312 (1989).

[2] Mississippi State Bar Economic Study 1970-71, p. 1; Interview, Larry Houchins, Executive Director, Mississippi State Bar, Nov. 29, 1990 [hereinafter Houchins Interview].

[3] Mississippi State Bar Economic Study 1970-71, pp. 5-6; *52,578 New Mississippians reported in 1990 Census*, Clarion Ledger, Jan. 24, 1991, at 1A.

Along with the growth in number of lawyers, and changes in the structure of practice, have come a significant increase in the number of lawsuits and rapidly escalating cost of law practice.[7] These changes, it is said, have dramatically increased competition among lawyers, have caused some lawyers to slavishly follow client wishes despite conflicting professional duties and have emphasized commercial gain to the detriment of professional responsibility.[8]

In its 1986 report, the Commission on Professionalism of the American Bar Association raised the question:

> Has our profession abandoned principle for profit, professionalism for commercialism?[9]

A Special Committee on Professionalism of The Mississippi State Bar issued a report in 1988 titled *LAW—A Business or a*

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[4] ABEL, *supra* note 1, at 9.

[5] Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 GEO. J. OF LEGAL ETHICS 195, 195 (1987-88) [hereinafter *Restatement*].

[6] Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 590 (1985).

[7] Chauvin, *supra* note 1, at 636.

[8] *Id.* at 636; *Restatement*, *supra* note 5, at 195-96; *see* Kleinberger, *Wanted: An Ethos of Personal Responsibility — Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*, 21 CONN. L. REV. 365, 378 (1989) ("The mentality of the market has come to the profession of law").

[9] Commission on Professionalism, American Bar Association, ". . . . *in the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism* 1 (1986) [hereinafter ABA Comm'n. Rep.; sometimes referred to as the Stanley Report]. The Commission was authorized by the ABA Board of Governors in December 1984, partially on the recommendation of United States Supreme Court Chief Justice Warren E. Burger. Preface, ABA Comm'n. Rep.

Profession?[10]

Both of these reports reflect the concern of lawyers and the organized bar that the changes experienced by the profession may be destroying what they regard as making the law a worthwhile and meaningful calling. The purpose of this article is to attempt to discuss what does make the practice of law worthwhile and meaningful. The title implies some of its conclusions: "Preserving" because, in response to the changes and concerns, lawyers, the organized bar and legal educators are responding to the challenges of change; "Professional," not because of any distinction of merit between an occupation called a profession and one called a business, but because the terms "professional" and "professionalism" denote a standard of excellence to which lawyers aspire;[11] "Tradition" because there has been an aspiration to a standard of excellence as long as there have been lawyers.

II. A Profession *and* a Business

While it can hardly be denied that law practice is a profession,[12] it is unrealistic to argue that it is not also a business.

> I reject the notion that there is any inherent difference between the "professionalism" of lawyers and the "commercialism" of businesses. While the terms "profession" and "business" have been used with varying meanings, I prefer to read the "profession" as meaning a type of occupation engaged in for compensation; the term "business" means, in my view, an enterprise conducted for profit. Using these definitions, I re-

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[10] Law — *A Business or a Profession*?, The Miss. Law. 14 (July/August 1988) (report of Special Committee on Professionalism, Mississippi State Bar).

[11] Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 Geo. J. of Legal Ethics 449, 451 (1988-89): "If . . . professionalism is a vague and contested concept . . . then why was the Commission [the ABA Commission on Professionalism] attracted to it as theme? The answer is surely for its rhetorical value — its usefulness in hammering out a consensus among Commission members, mobilizing a diverse and stratified bar, and expressing the bar's collective commitment to public service. More than anything else, what the Stanley Report proves is that . . . professionalism remains the bar's idiom of choice for debating about law practice and its regulation."

[12] *See, e.g.*, D. M. Campbell, Doctors, Lawyers, Ministers: Christian Ethics in Professional Practice 21-25 (1982); C.W. Wolfram, Modern Legal Ethics 14-15 (1986); Bowie, *The Law: From a Profession to a Business*, 41 Vand. L. Rev. 741, 743 (1988); Freidson, *Theory and the Professions*, 64 Ind. L.J. 423, 424-25 (1989).

> gard a law firm as a business that engages in the profession of practicing law.[13]

The point Professor L. Harold Levinson makes is that calling ourselves "professional" does not help lawyers define their duties. Nor does it define what lawyers aspire to be. Norman Bowie, Director of the Center for the Study of Values at the University of Delaware, finds that there is a tendency for lawyers to think more like business people. He asserts that "[i]f the law is to remain a profession in the traditional sense, it must not lose its traditional mission," and part of that traditional mission is an "altruistic spirit," a commitment to something more than the economic self-interest of business.[14]

III. WHAT IS PROFESSIONALISM

If we accept that the lawyer must have a commitment beyond self-interest to preserve his professional status, an "altruistic spirit," then just exactly what is it?

A. *Is it the Spirit of Public Service?*

The title of the 1986 Report of the ABA Commission on Professionalism, ". . . *in the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, borrows from Dean Roscoe Pound's definition of a profession as:

> . . . a group of men pursuing a learned art as a common calling in the spirit of a public service — no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental. . . .[15]

It is simply not possible to agree with a statement that lawyers in the 1990s engage in the practice of law only incidentally to earn a livelihood.

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[13] Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications*, 41 VAND. L. REV. 789, 791-92 (1988).

[14] Bowie, *supra* note 12, at 748. Bowie defines business according to economic theory as motivated by self-interest without altruistic spirit. The lack of any altruistic motivation distinguishes business from the professions. Encouragingly, while he notes the tendency for lawyers to think more like traditional business people, he also notes a trend for business people to take a more altruistic perspective. *Id.* at 749-59.

[15] R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).

> Lawyering has been a business for a long time. The image of a noble profession is primarily based on the activities of the most successful practitioners, who have had the time, skills, and financial security to develop grander visions of lawyers and their role in society. For many lawyers, however, the practice is hard, and the bottom line has always been extremely important.[16]

Professor Jack L. Sammons Jr. complains that calls to public service in the name of professionalism overlook the "ordinary practice of law as a moral enterprise."[17] The point is that there is much worthwhile and meaningful in the ordinary practice of law, which earns a livelihood for the lawyer, without the necessity of aspiring to the 1990 equivalent of the public service rendered by the 33 lawyers who participated in the Constitutional Convention of 1787.[18]

B. Is It Public Esteem?

Whatever the desire of lawyers for popularity, as a group they have never scored well with the public. The popular perception of lawyers derives primarily from their role as advocates in the courts and the very nature of that undertaking inevitably attracts criticism.

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[16] Singsen, *Competition in Personal Legal Services*, 2 GEO. J. OF LEGAL ETHICS 21, 44 (1988). One does not have to agree with Abel's statement that, "I believe that for most lawyers law is a means of earning a living before it is anything else," ABEL, *supra* note 1, at 12, to understand that the vast majority of lawyers of necessity must regard earning a livelihood as at least a primary purpose for engaging in the practice of law.

[17] Sammons, *Professing: Some Thoughts on Professionalism and Classroom Teaching*, 3 GEO. J. OF LEGAL ETHICS 609, 615 (1990). See the discussion of the practice of law as a moral enterprise at V(C) *infra*.

[18] The Report of the ABA Commission on Professionalism is introduced with the statement that 33 of the 55 participants in the 1787 United States Constitutional Convention were lawyers. One assumes that he is to conclude that the 33 participated because of their "public service" commitment as lawyers. ABA Comm'n. Rep. 1. Professor Rhode notes with respect to codes of professional responsibility:

> To be sure, a codified catechism that aspires too far beyond the capacity of 'ordinary men on ordinary occasions' may seem irrelevant to the resolution of practical problems. The ABA is not a plausible source for a Sermon on the Mount. Undoubtedly, the infusions of cant in the prior code have undermined its credibility in professional socialization.

Rhode, *supra* note 6, at 648.

> No one enters suit justly, no one goes to law honestly; they rely on empty pleas, they speak lies, they conceive mischief and bring forth iniquity. *Isaiah* 59:4.

The Prophet criticized the party-litigants (there were no lawyers as we know them), but from the time that lawyers began to represent litigants they have received the same type of criticism.[19] Lawsuits involve controversy, with lawyers on every side. One (and sometimes more) side always loses. The public does not always understand the defense attorney's vigorous representation of a person accused of a crime. Lawyers represent unpopular clients and causes, and that unpopularity is visited likewise upon them.[20]

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[19] History and literature are filled with examples of public criticism of lawyers. Thomas More, the lawyer-clergyman famous for his defiance of King Henry VIII, wrote in UTOPIA that the ideal society would have no lawyers "who cleverly manipulate cases and cunningly argue legal points." Martin Luther called canon lawyers "skinners, not of dead dogs, but of living humans"; their "ultimate end is money, not appreciation or knowledge"; an aspiring lawyer "wants a steel head, a silver purse, and an ass made out of lead," quoted in BODENHAMER AND ELY (Eds.), AMBIVALENT LEGACY, A LEGAL HISTORY OF THE SOUTH 204 (1984). Charles Dickens in BLEAK HOUSE charged that, "The one great principle of the English law is to make business for itself." Oxford, Mississippi, lawyer Phil Stone wrote in 1945:

> I find that a large number, probably a majority, of the people of Mississippi believe, and take for granted, that only a very few lawyers are honest. I find that most of them believe that we are somewhat like prostitutes, giving ourselves to any client for a price regardless of the justice of his cause. I find that most of them think we have no regard for justice, that we seek to accomplish our ends by any sort of pettifoggery, that we deliberately prevent justice being done. I find that most of them think we are lazy and unreliable. I find that most of them are disgusted at the slowness, the technicalities and the delay in our court procedure and are resentful toward us for those technicalities and delays.

Stone, *Our Low Estate*, 17 MISS. L.J. 90, 91 (1945). Interestingly, one of the most often quoted anti-lawyer lines, Shakespeare's "The first thing we do, let's kill all the lawyers" (KING HENRY VI, pt. II, Act IV, sc. 2, l. 72), was apparently intended as a compliment. *See* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 371 n.24 (1985) (Stevens, J., dissenting) ("[the statement] was spoken by a rebel, not a friend of liberty. . . . As a careful reading of that text will reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a totalitarian form of government").

[20] Mississippi Supreme Court Justice James L. Robertson observed that:

> The part of the lawyer's job others least understand is that which requires that he argue a position he may personally find distasteful or without merit. The lawyer presents his client's case in its most favorable light. He invokes every

> Lawyers must not aspire to an image of public popularity. That is the goal of a politician, whose success depends on pleasing a constantly changing populace whose favor is as fickle as a weathervane. The lawyer's only attainable goal is *respect*.[21]

C. *Is It the Collegiality of the "Good Old Days"?*

Professor Rhode notes that "[b]ar literature has long hosted laments for some happier era when law was a profession, not a business, and lawyers were stewards of societal values, not servants of private profit."[22] Former ABA President Stanley Chauvin noted that lawyers "no longer have the sense of fair play, honesty, cooperation and civility we once had."[23] Mr. Chauvin undoubtedly had in mind some of the sharp practices which have arisen in litigation in recent years and the lack of respect for other counsel and sometimes the court demonstrated by some litigators. In the "good old days" hardball tactics were suppressed by the peer pressure and expectations of a much smaller legal community. Competition for clients was taboo. The legal community doubtless was a more pleasant, collegial and comfortable place to earn a living.

Despite the distastefulness of the spirit of competitiveness and hardball litigation tactics, the public is probably better served by the lawyer of the 1990s than ever before.[24]

> substantive or procedural right which might conceivably aid his client. Usually, he is paid for doing this. The lawyer, for a fee, devotes his every energy and resource toward winning for his client. For this very reason we are regarded as hired guns, forensic prostitutes, and worse.

Robertson, *The Lawyer as Hero*, 53 MISS. L.J. 431, 438 (1983).

[21] Gerhart, *These Unloved Men*, 50 MISS. L.J. 513, 527 (1979). Professor Rhode observed that, "The American public has always been schizophrenic about lawyers: Lawyers are both folk-heros and folk-villains." Rhode, *supra* note 6, at 655.

[22] Rhode, *supra* note 6, at 592-93.

[23] Chauvin, *supra* note 1, at 638.

[24] United States Supreme Court Chief Justice William Rehnquist questions whether things were better in the "good old days." Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1987). *See also*, Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOYOLA U. CHI. L.J. 1149, 1152 (1987) ("In those good old days, local bar associations, at the urging of the ABA, would discipline lawyers who charged less than the suggested minimum fees").

Today's lawyer is the best educated and most extensively regulated lawyer in history. In 1890 the majority of American lawyers had attended neither college nor law school; in 1922 no state required law school attendance for bar admission; not until 1950 did the number of lawyers who had been to college equal those who had not.[25] Only since 1979 has Mississippi required that bar applicants be graduates of an accredited law school.[26]

Not only has every state, and the District of Columbia, adopted a professional code of ethics applicable to attorneys, many states have improved and made more effective their disciplinary procedures.[27] Although Mississippi adopted its first ethics code for lawyers in 1907 (and long before recognized the inherent judicial authority of the court to discipline attorneys),[28] it was not until 1974 that a disciplinary procedure was enacted, and that procedure was not funded until 1978.[29]

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[25] R. STEVENS, LAW SCHOOL, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 95, 172, 209 (1983); *see also* Hemleben & Bennett, *Beginnings of the Legal Profession in Mississippi*, 36 MISS. L.J. 155, 158 (1965) ("The young man who aspired to become an attorney 'read law' in a lawyer's office, and often after a short period of preparation 'hung out his shingle' ").

[26] The requirement of graduation from an accredited law school was enacted as a part of 1979 MISS. LAWS. 1000 codified at MISS. CODE ANN. § 73-3-2 (1972). The Mississippi history with respect to qualifications for Bar admission illustrates the gradual strengthening of the requirements. The MISSISSIPPI TERRITORIAL LAWS OF 1798-1800 required only that a person be of good moral character and pass examination by a territorial judge. SARGENT'S CODE at 110 (1799). From the time of Mississippi's admission to the United States in 1817 until 1892 there was no substantive change in these requirements, i.e., they remained good moral character and examination before a judge. In 1857 the "diploma privilege" was conferred upon graduates of the University of Mississippi with a bachelor at law degree, making that degree equivalent to a license to practice law. REV. CODE OF MISS., Ch. IX, Art. 1 (1857). The 1892 Code required that the examination for admission be in writing and specified eight subject matters for examination; the diploma privilege was amended to exempt the applicant from the written examination but required that a chancellor determine good moral character. MISS. CODE ANN., Ch. 12, §§ 202, 203, 208 (1892). The 1917 Code created a State Board of Law Examiners to administer the written examination to applicants and extended the subject matters for examination to 11, including professional ethics. For the first time, an educational requirement was imposed; the applicant for the Bar was required to have a high school education or its equivalent. MISS. CODE ANN., Ch. 6, §§ 180, 182, 184 (Hemingway 1917). Not until 1954 was there a requirement that an applicant for admission to the Bar have engaged in the study of law in any way, or that he have any college education. The law study requirement was a general course of study in a day or night law school which had been in existence for ten years or approved by the State Board of Bar Admissions, with satisfactory completion; or a general course of law study for a period of not less than two years under the supervision of a reputable Mississippi attorney. Additionally, two full years of college or its equivalent, or graduation from a junior college, teachers college or normal school requiring two full years of work for graduation was required. 1954 MISS. LAWS 239-40, § 6, codified in MISS. CODE ANN. § 8654 (1942). The 1979 legislation required, in addition to graduation from an accredited law school, a Bachelor's Degree from an accredited college or university or, alternatively, three years of college work in a college or university offering an integrated six-year pre-law and law course leading to the law degree. This legislation also terminated the diploma privilege for graduates of the University of Mississippi School of Law.

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[27] Kleinberger, *supra* note 8, at 366; Rotunda, *supra* note 24, at 1157.

[28] *See* Ex Parte Brown, 1 How. 303, 309 (1836), where the Mississippi High Court of Errors and Appeals declared its inherent authority "to control its officers, and to determine who should appear before it in the capacity of attorneys." The proceedings arose by motion to strike the name of the attorney in question from the roll of attorneys authorized to practice before the court. *Id.*

[29] The first statutory reference to a disciplinary mechanism was in 1892 when the Legislature provided that "any regularly incorporated bar association" could institute proceedings to disbar. MISS. CODE ANN., Ch. 12 § 223 (1892). In 1922 the Mississippi Supreme Court affirmed disbarment of an attorney by the Circuit Court of Humphreys County, where proceedings were initiated by a county bar committee:

> We have no statute prescribing the method of procedure in disbarment proceedings, nor have we any law imposing restrictions upon the courts as to the procedure to be adopted in such cases. Therefore, we must look to the general principles and rules announced and followed by the courts of other jurisdictions, together with what little local law we have on the subject.

Ex Parte Cashin, 128 Miss. 224, 232, 90 So. 850, 851 (1922). With the adoption of the unified bar association in 1932, the Board of Bar Commissioners was granted the authority to investigate and pass on complaints of unprofessional conduct, but its recourse in the event an attorney were found guilty of a violation of professional rules of conduct was by proceeding in the circuit or chancery court of the county of the accused attorney's residence. MISS. CODE ANN. §§ 8708, 8711 (1942). In 1974 for the first time Mississippi adopted a disciplinary procedure that allowed action to be taken against an attorney outside of a formal court proceeding. *See* MISS. CODE ANN. § 73-3-301, *et seq.* (1972). Unfortunately, the Legislature did not provide funding for this disciplinary procedure, nor did it approve a bar dues increase which would have allowed the State Bar to fund the procedure. Accordingly, the Mississippi Supreme Court in 1978, on the petition of the Mississippi State Bar, adopted a special assessment to be imposed upon all members of the Mississippi State Bar to finance the disciplinary procedure adopted by the Legislature. In the Matter of Mississippi State Bar, 361 So. 2d 503, 506 (Miss. 1978). The Court acted under its "exclusive and inherent disciplinary jurisdiction over attorneys admitted to practice or otherwise practicing law in Mississippi." *Id.* at 505. A subsequent legislative approval of increase in bar dues allowed the special assessment to lapse, and funding of disciplinary proceedings has continued to be through dues paid by members of the Mississippi State Bar. Houchins Interview, *supra* note 2. Until the 1974 legislation, and funding in 1978, there was no practical way in which disciplinary proceedings could be brought against attorneys in Mississippi, except through the volunteer efforts of local bar associations or committees, and even those proceedings had to commence in a circuit or chancery court. It is obvious that only the most flagrant of disciplinary cases could receive attention. Although not providing a record of disciplinary proceedings

Even in the "good old days" there were complaints about lack of professionalism.[30] United States Supreme Court Chief Justice Harlan Stone charged that lawyers in 1934 had "made the learned profession of an earlier day the obsequious servant of business, and tainted it with the morals and manners of the market place in its most anti-social manifestations."[31] Never, however, has the response to such complaints generated the level of attention to professional responsibility as we now experience. Professor Levinson describes the bar as "frantically active in examining and drafting standards of professional conduct."[32]

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which may have been prosecuted in the lower courts, from the time of the *Brown* case in 1836 until 1970, there are only 16 disciplinary cases reported in the Mississippi Supreme Court. That number tripled from 1970 to 1990. *See* MISS. DIG., "Attorney and Client," under subheading Suspension and Disbarment. From 1983 to 1990, there has been an increase in cases pursuant to the present Mississippi disciplinary procedure as follows: disbarments, five in 1983 to 15 in 1990; suspensions, three in 1983 to 11 in 1990; formal complaints filed against attorneys, 16 in 1983 to 42 in 1990. Attorney Discipline Statistics, Mississippi State Bar. Although the legislation setting forth the Mississippi disciplinary procedure in 1974 has not been repealed, the Mississippi Supreme Court adopted Rules of Discipline for the Mississippi State Bar effective January 1, 1984, which substantially modifies the legislative procedure and in effect supersedes it. Again, the Court acted pursuant to its "inherent jurisdiction of matters pertaining to attorney discipline." Rule 1(a), RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR.

[30] Sammons, *supra* note 17, at 611.

[31] Speech, *The Public Influence of the Bar*, reprinted in *The Professional Lawyer* 21, 23 (1990).

[32] Levinson, *supra* note 13, at 789. Professor Rhode describes the attention to legal ethics and etiquette in the last decade as "unprecedented." Rhode, *supra* note 6, at 590. Certainly, the report of the ABA Commission on Professionalism motivated much of this attention. But even prior to the issuance of the report in 1986, the 1983 ABA adoption of the Model Rules of Professional Conduct is said to have "amounted to the most sustained and democratic debate about professional ethics in the history of the American bar." Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 678 (1989). It is possible that some of the attention came in response to criticism leveled by Chief Justice Burger at the competence of the American trial bar and comments that the bar was moving away from principles of professionalism. Gerhart, *supra* note 21 at 515; Schneyer, *supra* note 11, at 450. The United States Supreme Court decision permitting lawyer advertising, Bates v. State Bar of Arizona, 433 U.S. 350 (1977), is also cited as a cause for heightened concern about lawyer professionalism. Interview with Julia Jill Nicholson, Professionalism Counsel, Center for Professional Responsibility, American Bar Association Oct. 29, 1990. There can be no doubt that the bar's attention to the subject has been vast. Professor Vincent R. Johnson reports that in addition to a "proliferation of texts, monographs, and treatises on legal ethics," there have been a substantial number of video resources made available for teaching purposes. Johnson, *Celluloid Legal Ethics: Discipline Redux*, 3 GEO. J. OF LEGAL ETHICS 745, 745 (1990). The Georgetown Journal of Legal Ethics was

Some may argue that this unprecedented attention to issues of professional responsibility demonstrates the magnitude of the problems faced by today's legal profession. On the contrary, I think the attention indicates that lawyers, judges, legal educators and the organized bar are committed to preserving the best of the professional tradition.

Following is a discussion of some of the tradition which distinguishes the lawyer as a professional, and which hopefully will identify standards to which he has historically aspired; and, then, a discussion of several ways in which legal educators have discussed professionalism and, in doing so, helped to better define the standards of excellence to which lawyers aspire.

IV. Some of the Tradition

A. Service

The purpose of the lawyer is to represent or serve the interests of persons other than himself. It is a tradition of the legal profession that the lawyer provide the best representation and service he is capable of rendering in every matter entrusted to him, regardless of compensation.

The first persons who could be considered lawyers in the

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initiated in 1987 as the only publication devoted solely to legal ethics in the English-speaking world. Drinan, *Introduction to the Georgetown Journal of Legal Ethics*, 1 Geo. J. of Legal Ethics 1 (1987). Every law school accredited by the ABA must now require its students to take a course in professional responsibility. Kleinberger, *supra* note 8 at 366-67. Former New York University Law School Dean Norman Redlich says that law school graduates in the last 10 to 15 years have had more training in professional responsibility than any generation of law school graduates. 76 ABA J. 47 (Sept. 1990). The American Law Institute has underway the preparation of a RESTATEMENT OF THE LAW GOVERNING LAWYERS which will be its first effort at addressing the law regulating lawyers. *See Restatement, supra* note 5. The 1972 ABA Model Code of Judicial Conduct, adopted in whole or in part by 47 states (including Mississippi) and the District of Columbia, Shaman, *Judicial Ethics*, 2 Geo. J. of Legal Ethics 1, 3 (1988), has now been completely re-examined and the ABA has approved a 1990 Model Code of Judicial Conduct. Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 Geo. J. of Legal Ethics 53, 53 (1990). The ABA and its sections and divisions have 11 different committees which deal with the subject of professional responsibility and ethics. *See* 1990/91 ABA DIRECTORY. The Mississippi State Bar has Committees on Proressional Responsibility, Ethics and Professionalism. Over 30% of the Mississippi State Bar's annual budget is related to professional responsibility. Miss. State Bar Annual Report 1989-90, p. 10.

modern sense charged no fee for their services. The jurisconsults of the Roman Republic were "patrons" advising "clients" and supporting or defending their causes because of a duty which the patron owed his client.[33]

> The magnificent structure of the mature Roman law could never have come into existence nor could Roman law have achieved its world-wide influence had it not been for a class of legal experts who, in counseling parties and advising magistrates and judges, developed from early times a special skill in appraising new situations produced by the increasing complexity of Roman life and in suggesting solutions consistent with the order of the legal system as a whole.
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> . . .
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> The Roman jurisconsult did not practice law in the manner we understand by this expression. He would not ordinarily try cases in court or aid parties in their pleading before magistrates and judges. He confined himself to giving advice on questions of law. Moreover, his advice was free. He did his work, not as a way of earning a living, but rather as a gentleman's hobby. It was this very circumstance which gave the legal profession its unusual standing.[34]

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[33] H.J. WOLFF, ROMAN LAW, AN HISTORICAL INTRODUCTION 96 (1951); Pound, *supra* note 15, at 51. The Greeks, before the Romans, took up the study of legal questions. But Greek philosophers and orators never attempted to address the practical resolution of disputes within a legal system as did the Romans. They had constitutions, statutes, regulations, courts, judges and juries but no intellectually organized law nor lawyering as a profession. WOLFF, *infra* at 92. *But see* R.J. BONNER, LAWYERS AND LITIGANTS IN ANCIENT ATHENS, THE GENESIS OF THE LEGAL PROFESSION vi (1927). Bonner considers professional prosecutors, speech-writers and advocates who aided litigants in the Athenian courts "entitled to be regarded as professional lawyers." But the Athenians deliberately attempted to thwart the development of legal professionals. In contrast, in the Roman judicial system:

> [t]here emerged a group of legal professionals, the jurists. This group was largely self-recruited through informal modes of legal education; its membership was determined by recognition from the group itself and from without. The jurists began to study and manipulate the materials of private law in a disciplined, rational fashion: they enunciated and organized existing legal rules in a convincing presentation, they discovered and described the systemic boundaries and internal articulation of private law, they deduced fundamental principles and concepts of law, and they applied these principles and concepts in the coherent development of new legal rules and institutions.

B.W. FRIER, THE RISE OF THE ROMAN JURISTS 272 (1985).

[34] WOLFF, *supra* note 33, at 91, 96.

Although this class developed from the patron-client relationship and the original source of the jurisconsult's authority was the political standing of his class, eventually the source of authority became at least in part his professional prestige. The juriconsults and their successors continued to provide services free of charge and were largely responsible for the development of the classical science of law as the outstanding contribution of Rome to the cultural evolution of mankind.[35]

The English legal profession (and hence its American counterpart) did not descend from the Roman jurists. That institution had been dead for centuries when the English legal profession developed.[36] It nonetheless influenced the English bar and is a part of its tradition. In Blackstone's historic *Commentaries on the Laws of England*, it is reported that lawyers:

> . . . may take upon them the protection and defense of any suitors, whether plaintiff or defendant; who are therefore called their clients, like dependents upon the ancient Roman orators. These indeed practice gratis, for honor merely, or at most for the sake of gaining influence: and so likewise it is established with us, that a counsel can maintain no action for his fees; which are given, . . . not as a salary or hire, but as a mere gratuity, which a counselor cannot demand without doing wrong to his reputation.[37]

A footnote to one of the American editions of *Blackstone* points out that the rule that counsel cannot maintain an action for his fees is obsolete in this country, "for it is not regarded as a point of honor not to ask a proper compensation for work done."[38] Nonetheless the tradition of service to client above self-interest was ingrained in the American lawyer. United States Supreme Court Justice Oliver Wendell Holmes said:

> I should say that one of the good things about the law is that it does not pursue money directly. When you sell goods the price which you get and your own interests are what you think about

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[35] *Id.* at 91, 111-12.

[36] H. COHEN, A HISTORY OF THE ENGLISH BAR AND ATTORNATUS TO 1450, p. 19 (1929).

[37] BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Bk. III, sec. 40, at 1530-31 (Jones ed. 1915).

[38] *Id.* at 1531 n.12.

> in the affair. When you try a case you think about the ways to win it and the interests of your client. In the long run this affects one's whole habit of mind.[39]

The structure of the legal profession may be changing, but the lawyer almost always provides service to, or representation for, a client, albeit the client may be a corporation, the government or some other entity, and the lawyer may be house counsel, civil servant or employee.[40] The lawyer's "habit of mind" is the best interest of his client, not his own economic self-interest.

B. Learning

The tradition of law as a "learned" profession probably stems from the fact that the earliest lawyers (after the demise of the Roman jurists) came from the clergy. A lawyer's work has always required special knowledge and particularly for the first two centuries after the year 1000, the "lettered" or "learned" man was almost always a cleric.[41] Furthermore, along with philosophy, legal studies was regarded as one of the two great learning areas of Medieval times.[42]

With medicine and the ministry, law has historically been categorized as one of the three "learned" professions.[43] The specialized knowledge of the professional in medicine, divinity and law has been regarded as held in trust for the benefit of those who require that knowledge.[44]

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[39] Paper, "The Bar as a Profession," reprinted in HOLMES, THE COMMON LAW AND OTHER WRITINGS 153 (1982); *see also*, Robertson, *supra* note 20, at 440 ("The Bar has long accepted, and is ethically bound by, the premise that, on the priority scale, rendering legal services is first and collecting fees is second").

[40] Law professors, legal authors and publishers are examples of lawyers who do not represent clients. Levinson, *supra* note 13, at 798.

[41] MEDIEVAL CALLINGS 182 (Jacques LeGoff ed. 1987). The practice of law at this time was almost completely in the hands of the clergy. By the twelfth century, lawyers not drawn from the clergy became prominent in the courts. In the thirteenth century they became dominant. The Church ultimately forbade its clergy to practice in the courts. POUND, *supra* note 15, at 73; R. DUCANN, THE ART OF THE ADVOCATE 13 (1964). By 1440 it is said that the lawyer earned enough money by practice of law to be able to support himself without Church preferment. Law could be regarded as a profession in the fifteenth century. COHEN, *supra* note 36, at 151, 456.

[42] C.M. RADDING, THE ORIGINS OF MEDIEVAL JURISPRUDENCE ix (1988).

[43] CAMPBELL, *supra* note 12, at 20; WOLFRAM, *supra* note 12, at 14.

[44] Pellegrino, *Character, Virtue and Self-Interest in the Ethics of the Professions*, 5

The tradition, as seen by prominent Memphis attorney Lucius E. Burch, Jr., is not just that the lawyer be "learned in the law" but also that he be a person of breadth, widely read outside the discipline of law.[45] It is difficult to envision one who is required to deal with more different disciplines and areas of learning than the average attorney. A Washington lawyer observes that "[t]oday's lawyer is almost as likely to be focusing on economic, scientific, financial, or political questions as on strictly legal issues."[46] This complexity has led to increasing specialization. Burch views the degree of specialization as a danger to the profession: "[W]e seem to be abandoning our traditional role as lawyers and are becoming only highly expert technicians, little different from other specialists, as accountants, financial consultants, physicists and so on."[47]

A tradition to be preserved for the worthwhile and meaningful practice of law is the tradition of being a learned profession, not in the narrow technical sense, but in the broad sense.[48]

C. *Justice*

The lawyer is an integral part of the American system of justice: "the responsibility of administering justice is largely in his hands; his conduct involves the integrity of the courts of which he is an officer."[49]

In his text, *Modern Legal Ethics*, Professor Charles W. Wolfram indicates that the terminology "officer of the court" is of limited significance and notes: "It is difficult to point to many respects today in which lawyers enjoy advantages over nonlawyers because of any presumed court officership, aside from the

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J. CONTEMP. HEALTH L. & POL'Y 53, 68-69 (1989). This concept, of course, reinforces the lawyer's service ethic discussed at IV(A) *supra*.

[45] Burch, *Help Return the Law to a Learned Profession*, The Commercial Appeal, Dec. 4, 1988, at E3.

[46] Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 684-85 (1988).

[47] Burch, *supra* note 45, at E3.

[48] Professor Rhode contends that providing law students a systematic exposure to the forms of moral reasoning is essential for a proper appreciation of ethical responsibilities. Rhode, *supra* note 6, at 651. Certainly this would be in keeping with the tradition of a "learned" profession.

[49] In re Poole, 222 Miss. 678, 686, 76 So. 2d 850, 853 (1955).

exclusive license to represent clients before courts."[50]

Mr. Burch, in contrast, regards the lawyer as having been granted "the most awesome monopoly existent in our society, the exclusive privilege of audience before the courts."[51] As a practicing lawyer, I agree with Mr. Burch's appreciation of the privilege granted lawyers to appear in the courts. Furthermore, the significance of the tradition of the lawyer as an officer of the court is not one which should be taken lightly. An opinion by Justice Crampton, Court of Queen's Bench, is instructive in this regard:

> This Court in which we sit is a temple of justice; and the Advocate at the Bar, as well as the Judge upon the Bench, are equally ministers in that temple. The object of all equally should be the attainment of justice; . . . we are all — Judges, Jurors, Advocates and Attorneys — together concerned in this search for truth: the pursuit is a noble one, and those are honored who are the instruments engaged in it. . . .
> [L]earned counsel described the Advocate as the mere mouthpiece of his client; he told us that the speech of the Counsel was to be taken as that of the client; and thence seemed to conclude that the client only was answerable for its language and sentiments.
>
> Such, I do conceive, is not the office of an Advocate. His office is a higher one. To consider him in that light is to degrade him. . . . He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not

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[50] WOLFRAM, *supra* note 12, at 17. Professor Eugene R. Gaetke calls the officer of the court reference "vacuous and unduly self-laudatory." Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, *passim* (1989). He offers several recommendations to give substance to the characterization of lawyer as officer of the court. These include making pro bono work by lawyers mandatory; requiring lawyers to come forward with material information in serious judicial proceedings (such as felony prosecution); requiring lawyers to do more to protect the public from unqualified practitioners; requiring lawyers to contribute to a client's security fund to reimburse clients whose lawyers have absconded with their money; modifying the duty of confidentiality in certain circumstances (e.g., to prevent harm to another); expanding the lawyer's duty to reveal contrary legal authority, perhaps to include disclosure of adverse facts in civil cases; strengthening the lawyer's duty to expedite legal proceedings and requiring lawyers to disclose misconduct by any participant in the judicial process.

[51] Burch, *supra* note 45, at E3.

> knowingly misstate the law — he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and retained and remunerated for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other license which in any case, or any party or purpose, can discharge him from that primary and paramount retainer.[52]

The tradition that the English advocate as officer of the court owed higher duties to the court than mere zealous representation of his client could hardly be more clearly stated.

The duty of fidelity to the court and avoidance of falsehood have been a part of the oath of lawyers in Mississippi since the original laws of the Mississippi Territory.[53] Since 1892, the statutory duties of Mississippi attorneys has included "to employ . . . such means only as are consistent with truth, and never to seek to mislead by any artifice or false statement of the law."[54]

The Mississippi cases are consistent, not only in calling the attorney an officer of the court, but in imposing duties on the lawyer because of the relationship, and penalizing him for their violation. In 1836, the Mississippi High Court of Errors and Appeals declared "the right to control its officers" and disbarred an attorney for unprofessional conduct.[55] In 1922 the Mississippi Supreme Court noted the absence of a statutory disbarment proceeding. The court declared its right to improvise its own proceeding "on account of the relation of the attorney to the court; that is, he being an officer of the court."[56] In 1941, a lawyer was admonished and a case reversed for failure to bring to the court's attention the lawyer's relationship to a juror.[57] In 1972 the Court observed that: "In addition to representing his client, defense counsel was an officer of the court, as are all lawyers, and was duty bound to promptly inform the court when he discovered that the witness had not been sworn."[58]

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[52] The Queen v. O'Connell, VII Ir. L. Rep. 261, 312-13 (Q.B. 1844).

[53] Sargent's Code of Laws of Mississippi Territory enacted 1798-1800, at 110. Since 1822 the Oath has read: "I do solemnly swear that I will demean myself, as an attorney and counselor of this court, according to the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof. So help me God." Hutchinson's Code, Ch. XXVI, Art. 3, § 1 (1848); Miss. Code Ann. § 73-3-35 (1972).

[54] Miss. Code 1892, Ch. XII, § 210; Miss. Code Ann. § 73-3-37 (1972).

[55] Ex parte Brown, 1 How. 303, 309 (1836).

[56] Ex parte Cashin, 128 Miss. 224, 90 So. 850, 851 (1922).

In 1983 a lawyer was held in contempt of court for failure to proceed with appeal (or seek court permission to withdraw) on behalf of a client who had not paid for the appeal:

> . . . [w]hen an individual accepts a license to practice law and becomes a member of the bar of this state and of this Court, he assumes many obligations. At least two of these have priority over his certainly legitimate prerogative to charge a legitimate fee for his services. Along with his fellow members of the bar, each lawyer assumes the duty to assu[r]e that every person in substantial need of legal services receives that service without regard to ability to pay. Beyond that, each lawyer, in conjunction with his fellow members of the bar, assumes an obligation as an officer of the Court to assure that, before this Court makes the life shattering decisions tendered to it, it has the benefit of competent advocacy on behalf of both sides.
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> . . .
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> This is merely a part of the quid pro quo the lawyer must be prepared to give when he accepts his license to practice law.[59]

The reach of the Mississippi Supreme Court in regulating lawyers as its officers extends far beyond the lawyer with a case before the court. It has exercised its inherent judicial authority to adopt Rules of Professional Conduct applicable to Mississippi lawyers, Rules and Regulations for Mandatory Continuing Legal Education and Rules of Discipline for the Mississippi State Bar, superseding in the last instance a prior legislative enactment on the same subject.[60]

The lawyer as officer of the court, with duties in the administration of justice, often comes into conflict with the lawyer as advocate for a client. Professor L. Ray Patterson describes that conflict:

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[57] Miss. Power Co. v. Stribling, 191 Miss. 832, 3 So. 2d 807 (1941).

[58] Sanders v. State, 260 So. 2d 466, 470 (Miss. 1972).

[59] Allison v. State, 436 So. 2d 792, 796-97 (Miss. 1983).

[60] *See supra* note 29.

> One of the costs of a culture which reveres the dignity of the individual is the law's complexity in its attempt to insure fulfillment of twin goals: justice for the individual and order for society. These goals represent an inherent conflict and thus create tension in the law. However phrased to fit the applicable rules, legal arguments are almost invariably a plea of one litigant for order (uphold the sanctity of contracts), and another's plea for justice (unconscionable contracts are not to be tolerated). Because the person sought to be held responsible for his or her wrongful conduct wants relief and the wronged person wants recompense, neither is concerned with order or justice except as the terms are defined in accordance with their own interests.
>
> The lawyer is the fulcrum on which this tension is centered and the conflict resolved.[61]

The tradition of lawyer as officer of the court teaches that the lawyer cannot resolve this conflict or tension for his own self-interest, or the interest of his client, in such a way as to violate integrity in the court's administration of justice. As an officer of the court, he has a duty to promote that integrity.

V. STANDARDS OF EXCELLENCE

Dean Bryant G. Garth observes:

> Not everyone is precise about what professionalism means, but there seems to be a growing literature suggesting that we need more of whatever it is.[62]

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[61] Patterson, *An Inquiry Into the Nature of Legal Ethics: The Relevance and Role of the Client*, 1 GEO. J. OF LEGAL ETHICS 43, 82 (1987). This "tension" centered on the lawyer is one of the many difficult dilemmas with which a practicing attorney must deal. Justice Robertson describes another one: "As in so many other aspects of his professional life, the lawyer lives within the tensions created by the ambiguities of lawyering. At one polar extreme we insist that the client's individuality and integrity be preserved inviolate. At the other, I believe it not only desirable but positively obligatory that the lawyer present to his client appropriate moral and ethical considerations. As elsewhere, I find little use in an either/or debate. The lawyer must respect both of these considerations — and function within the tensions they create." Robertson, *supra* note 20, at 465.

[62] Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. LAW J. 433, 434 (1989).

If the organized bar sounded the call for the preservation of professionalism,[63] it is the legal educators who are defining professionalism and the standards of excellence to which lawyers should aspire. Some of their contributions are discussed below.

A. *The Model Rules of Professional Conduct: Loyalty But Not Integrity?*

Some commentators blame the bar's perceived emphasis on commercialism to an increasing competition for business.[64] The perceived lack of professionalism in trial advocacy is attributed to over-emphasis on the lawyer's duty to zealously represent his client and to ignore the lawyer's duty to the court, opposing counsel and other parties.[65] The problem in the litigation area has been described as "so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants,"[66] and has led to the adoption of conduct codes to encourage civility and curb abusive litigation tactics.[67]

Professor Patterson's article, *An Inquiry Into the Nature of*

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[63] *See supra* text accompanying footnotes 9 and 10.

[64] *See, e.g.*, Brown, *The Quiet Revolution in the American Law Profession: Remarks Before the Commission on Professionalism of the American Bar Association*, 14 FORD. URB. LAW J. 855, 863 (1986). Jones comments on the "decline in the traditional attorney-client loyalty" and the "bidding" processes by which some clients now select counsel. *Jones*, *supra* note 46, at 688.

[65] *See, e.g.*, Fitzwater, *Toward a Renaissance of Professionalism in Trial Advocacy*, 7 5TH CIR. REP., No. 5, at 389, 392-93 (March 1990).

[66] *Dondi Properties Corp. v. Commerce Savings & Loan Assn.*, 121 F.R.D. 284, 286 (N.D. Tex. 1988).

[67] The *Dondi* court adopted standards of practice for the United States District Court, Northern District of Texas. They were drawn from Guidelines of Professional Courtesy and a Lawyer's Creed which had been adopted by the Dallas Bar Association. *Id.* at 287-88 The Board of Bar Commissioners of the Mississippi State Bar has adopted a *Lawyer's Creed*, *Guidelines of Professional Conduct*, and *Standards of Litigation Conduct*. Codes such as these may be helpful to lawyers by reminding them of duties of civility, but as Professor Rhode noted in discussing the ABA Model Rules of Professional Conduct, there is no code, however well drafted, which can definitively respond to the complexities of professional practice. Rhode, *supra* note 6, at 647. In contrast to the American preoccupation with written codes and rules, it is a characteristic of European legal ethics that they are largely unarticulated, do not consist of rules, but rather of standards and sometimes even the standards are not formally expressed. Glenn, *Professional Structures and Professional Ethics*, 35 MCGILL L.J. 425, 428 (1990).

Legal Ethics: The Relevance and Role of the Client,[68] advocates that the duty of candor to the court and fairness to other parties is the client's duty, discharged by the attorney in his representative capacity. He would make ethics rules a matter of general law and make the client subject to that law, much as he now is pursuant to Rule 11 of the Federal Rules of Civil Procedure. In doing so, he argues, the self-interest of the lawyer to represent his client without regard to duties to the court and others would be neutralized. The lawyer would no longer have the pretense of duty to client as an excuse for abusive tactics arguably in violation of duties to the court and other parties; likewise, the lawyer faced with a conflict in duties to the court and others with duty to client would be better protected in exercising his independent professional judgment as to proper resolution of the conflict — his duty to client would include proper discharge of the client's duty to court and others in his representative capacity.

Patterson calls lawyer duties to the client loyalty duties and duties to others when acting for the client integrity duties. The ABA Model Rules of Professional Conduct[69] constitute a code of loyalty duties dealing primarily with the conduct of the lawyer in relation to his client to whom he owes loyalty duties of competence, communication, avoidance of conflicts of interest and confidentiality

The integrity duties of the lawyer involve two principles: respect of the court, where the rule is candor; and fairness to others, where the rule is truthfulness. Albeit these principles are embodied within the Model Rules, Patterson argues that their implementation is governed by the rights and duties of the client. To assure observance of these principles, and thereby promote integrity in the administration of law, is the objective of the Patterson proposal. Incorporating ethics rules into the general law, and making the client subject to that law, would promote integrity in the administration of justice.

Although Professor Patterson's thesis is that rules of ethics can be effective in promoting ethical conduct by most lawyers only if they are given efficacy as an integral part of the general law, and that the duties of clients must be a part of this law, he has with great clarity discussed the lawyer's duties of loyalty and integrity.[70] A lawyer who aspires to a standard of excellence will discharge the integrity duties regardless of their origin of authority.

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[68] *See* Patterson, *supra* note 61.

[69] The Mississippi Rules of Professional Conduct, as adopted by the Mississippi Supreme Court, are modeled upon and essentially the same as the ABA Model Rules.

B. An Ethos of Personal Responsibility

Professor Daniel S. Kleinberger suggests in his article, *Wanted: An Ethos of Personal Responsibility — Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers*,[71] that the profession has developed a perspective on lawyer morality which allows lawyers to disclaim a sense of personal responsibility for their actions. He attributes this to conventional professional notions about the moral content of the adversary system; lawyers have allowed the duty of zealous advocacy for clients to justify disclaimers of personal morality.[72]

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[70] Although not identified as duties of the client, as Patterson suggests, the Mississippi statutory law does embody some of the integrity rules as statutory duties of attorneys. *See* MISS. CODE ANN. § 73-3-37 (1972):

> It is the duty of attorneys: . . . (2) to maintain the respect due to courts of justice and judicial officers; (3) to employ for the purpose of maintaining the causes confided to them, such means only as are consistent with truth, and never to seek to mislead by any artifice or false statement of the law; . . . (5) to abstain from all offensive personalities, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which they are charged.

The Mississippi attorney who wishes to over emphasize the duty of loyalty to the client to the detriment of integrity duties to the court and others would do well to consider the effect of these statutory duties.

[71] *See* Kleinberger, *supra* note 8.

[72] Professor Thomas L. Shaffer concurs and argues that the adversary ethic underlying lawyer codes is unsound. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 697 (1988). Professor Ted Schneyer maintains that the adversary ethic is misconceived as requiring lawyers to represent clients in ways "contrary to the lawyers' personal values or harmful to the legitimate interests of third parties." Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529, 1550 (1984). He cites some professional code provisions which have been criticized as over balancing zealous client representation vis a vis the legitimate rights of other parties as being formulated for the purpose of "exhorting lawyers to transcend their [own self] interests, not their personal morality." *Id.* at 1546. For example, to exhort the lawyer to vigorously represent his perhaps not well-paying criminal defense client rather than act as " 'double agents' for the criminal justice bureaucracy by advising

Kleinberger argues that the lawyer must understand that his own actions matter:

> In a world of expediency, maintaining an ethical character requires, at a minimum, a commitment to doing right for right's sake. That commitment, in turn, requires a focus on oneself as a moral actor and a sense that what one does as an individual is morally important. [T]he decisions lawyers make have individual moral content, and . . . each lawyer must bear personal responsibility for the results he or she helps to produce.[73]

The point Kleinberger makes is not that lawyers should refuse to advocate the causes of clients with whom they disagree, but that the lawyer is not required to and should not abandon personal morality or virtue in his professional life.

The Model Rules of Professional Conduct in fact do not require a lawyer to ignore personal responsibility and morality; to the contrary, they direct that he exercise "independent professional judgment" and:

> In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[74]

Furthermore, the Rules state that they are not intended to "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[75]

If the lawyer feels compelled to violate his own standards of morality in representing a client, something is wrong. If an amoral lawyer is allowed to employ immoral means to advance a client's cause under the guise of zealous advocacy, something is likewise wrong.[76]

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clients to cop pleas when it might not be in their interest. . . ." *Id.* at 1545.

[73] Kleinberger, *supra* note 8, at 370, 380; *see also* Morawetz, *Lawyers and Conscience*, 21 CONN. L. REV. 383, 383 (1988-89) ("To abstain from holding certain persons morally responsible is to exclude them from the general run of humanity").

[74] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 2.1 (1983), adopted by the Mississippi Supreme Court with effective date July 1, 1987, as *Mississippi Rules of Professional Conduct*, Rule 2.1.

[75] *Id.* (preamble).

[76] To justify immoral or illegal actions by disclaiming personal responsibility be-

Mississippi Supreme Court Justice James L. Robertson describes the lawyer in representing his client as striving toward "noble ends":

> . . . the way in which one pursues noble ends must come under scrutiny. Noble ends do not justify ignoble means. The [lawyer] must bring to his task honesty, integrity, wisdom, fair dealing and good judgment.[77]

C. *The Practice of Law as a Moral Enterprise*

Professor Sammons calls on legal educators to explore and develop the concept of lawyering as a moral enterprise. It is a concept, he says, overlooked by law schools and the profession:

> Listen to those practicing attorneys who are currently talking about improving the professionalism of the Bar. We never hear from them a justification of the ordinary practice of law as a moral enterprise. Instead, we hear that lawyers have public obligations outside of the ordinary practice.[78]

In teaching, Sammons says, legal educators should reconnect the law and legal processes with real people, the people to their lawyers, and all three to morality, and avoid analysis of disputes from the perspective of "stick figure clients who only seek wealth and freedom."

> When we fail to make these connections, we risk our graduates also failing to connect legal problems with their moral dimensions. We risk their failure to see that moral counseling is central to the lawyer's role.
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> . . .
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> . . . [w]e should be willing to tell our students that clients will usually want the same goods that they want. For example, our clients will usually want the good of the respect of others, the

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cause acting in a representative capacity on behalf of another, is similar to the argument made by World War II Nazi war criminals who attempted to justify atrocities by assertions that they were following Nazi law. Such arguments make "a mockery of the relationship between law and morality." Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 789 (1989).

[77] Robertson, *supra* note 20, at 445.

[78] Sammons, *supra* note 17, at 615.

> good of doing the "right thing," and the good of being honest. We should be willing to show our students that helping clients to seek these goods is also the ordinary practice of law. By doing this, . . . we will be professing to our students conceptions of the ordinary practice of law as a moral enterprise. . . .[79]

Justice Robertson's article, *The Lawyer as Hero*, describes the practice of law as a moral enterprise.[80] He views the lawyer in separate roles of counsellor, architect and advocate. As counsellor, he emphasizes that the lawyer's most important skill is the ability to make reasoned judgments and that a part of the lawyer's duty to the client is to provide independent judgment. "He violates his trust when he simply tells the client what he knows the client wants to hear."[81] Often the client relationship dictates that the lawyer act not only as legal advisor but as "psychologist, counselor, and pastor," and that "the lawyer presents his client appropriate moral and ethical [and not just legal] considerations."[82] As architect, the lawyer creates corporations, business structures for clients, drafts wills and plans estates, draws contracts "and in dozens of other ways provides legal structures through which people protect their property and pursue their dreams."[83] As advocate, the lawyer always stands as champion for his client's rights. Justice Robertson counts the lawyer who fulfills these roles well as one of society's "heroes"; he has undertaken responsibilities which are worthwhile and meaningful; the practice of law in this manner can properly be regarded as a moral enterprise.

D. *Delivering Legality or Solving Problems?*

In his article, *Legal Education and Large Law Firms: De-*

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[79] *Id.* at 622. The lawyer who considers and discusses matters of conscience (his own and his client's) with his client is "more apt to reach a deeper understanding with the client about where both of them stand, what the client really wants and can expect from the case, and its importance in relation to other matters." Bennett, *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U.L. REV. 45, 61 (1986).

[80] *See* Robertson, *supra* note 20.

[81] *Id.* at 464.

[82] *Id.* at 464-65.

[83] *Id.* at 435.

livering Legality or Solving Problems,[84] Dean Garth addresses the issue of whether and how law school teaching might help to cultivate professionalism in large law firms.[85] He uses the dichotomy of two approaches to both the teaching and practice of law, "delivering legality" and "problem solving," as the basis for his discussion. Garth sees the concept of "delivering legality" as "the lawyer, trained to establish the principles and goals underlying a particular law advis[ing] the client about just those principles and goals," and bringing the client within the socially beneficent purposes of the law.[86] In contrast, the concept of "solving problems" emphasizes law and legal regulation as obstacles to be overcome or circumvented and the lawyer's role to find a way, regardless of public purpose.

As professional values, Dean Garth asserts that the concept of legality "asks too much and problem solving asks very little."[87] He suggests that the legality concept has been abandoned and cannot be revived as a means to promote independent professional values in large law firms. He acknowledges merit in the problem solving concept, but advocates that in order to retain the value of independent professional judgment and a fundamental value that lawyers are under an obligation *not* to counsel ways for clients to get away with violations of the law, the lawyer's advice, even as a problem solver, should be tempered with a bias toward legality.

> Whatever lawyers might be tempted to do to support themselves and their practices, they will have problems if the law

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[84] *See* Garth, *supra* note 62.

[85] Lawyers in large firms are seen as being more susceptible to client demands than independent practitioners and members of smaller firms:

> Members of the most affluent, prestigious and influential hemisphere of the Bar, in large law firms serving corporate capital, have less power over their clients (and presumably less leeway to determine how they practice) than do those in the other hemisphere of considerably less prestige who serve the needs of individuals and small businesses in local neighborhoods. This suggests that the content of some of what is deplored as 'commercialism' may stem from acquiescing to the concrete demands of clients rather than being an invention by professionals responding to economic incentives alone.

Freidson, *supra* note 12, at 429.

[86] Garth, *supra* note 62, at 435.

[87] *Id.* at 439-40.

> part becomes too small. Lawyers as a group have a stake in legal regulation and the implementation of legal principles. It may hurt the business of the large law firms to insist on a professional norm against counseling a knowing violation of the law, and to take the norm more seriously than simply 'perhaps an argument can be made.' But the long-term survival of the legal profession is linked to a serious approach to law.[88]

Garth argues that the tradition of the legal profession calls for "a certain respect for the integrity of a legal argument" and acknowledges that not all arguments about legal principles are equally valid. Beyond those aspects of the tradition:

> . . . [w]e [lawyers] probably have a certain faith that someone schooled in the tradition of laws and principles gives a better, more persuasive, deeper, or more thoughtful form of advice, even when the advice looks closer to the moral and political than to what is conventionally understood as legal. If we take the best in our tradition seriously, it will encourage independent professional judgment.[89]

He advocates that law students and lawyers be encouraged to exercise their independent professional judgment with a respect for the law, with a bias toward legality, and that lawyers also bring their independent values from "*outside* clear legal standards and uncontested legal principles by letting personal morality and perceptions of public policy play a role in all legal advice."[90]

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[88] *Id.* at 441.

[89] *Id.* at 441.

[90] *Id.* at 442. Professor David Luban also directs attention to the professionalism ideal in the context of large-firm corporate lawyers. He discusses the Louis Brandeis vision of the legal profession and refers to its elements as "progressive professionalism." He sees the primary activities of progressive professionalism to have been law reform and "counseling clients away from immoral or socially pernicious projects." For today's lawyer, he concludes that law reform must be a morality of aspiration but that "the lawyer is duty-bound to take the progressive professionalist course" with respect to client counseling, a concept admittedly "in sharp conflict with the ethic of client loyalty." Luban, *The* Noblesse Oblige *Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 727, 737-38 (1988).

E. Making Society's Legal System Accessible to Society

Professor Levinson describes the duties of lawyers as unique in their "public role in making society's legal system accessible to society."[91] He cites lawyer duties to assist in assuring society of the best possible legal system, to serve collectively as a bulwark against governmental tyranny and to participate in governmental and civic affairs. His article is directed principally, however, to the role of the lawyer in performing services, and not to the extent of the duty.

I would suggest that lawyers do have an affirmative duty to assure that the legal system is accessible to *all* persons in society. It is a duty that the bar and governing authorities have long acknowledged in the requirement that lawyers accept assignment of representation of indigent defendants in criminal cases,[92] that they provide assistance to the defenseless and oppressed,[93] and in the encouragement of public interest legal service or pro bono work at reduced or no fee for persons of limited means.[94] The discretionary nature of the pro bono provision in the Model Rules has been criticized.[95] The ABA Commission on Professionalism refrained from recommending a mandatory pro bono requirement for all lawyers but called such services a "moral obligation on the part of the individual lawyer."[96]

In his book, *Beyond Monopoly, Lawyers, State Crises and Professional Empowerment*, Terence C. Halliday concludes that, "[t]he established profession can mobilize its concentration of expertise and bring its associational influence not at the individual but at the collective level to the service of state power."[97] Perhaps assuring accessibility of the legal system might better be addressed as a collective bar undertaking[98] not predicated on the volunteer participation of individual lawyers, but structured so that (at least through funding) all members of the bar would participate.[99] It is an issue that demands the organized bar's continued attention.

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[91] Levinson, *supra* note 13, at 800.

[92] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.2, *Mississippi Rules of Professional Conduct*, Rule 6.2 ("A lawyer shall not seek to avoid appointment . . . except for good cause"); *see also* Young v. State, 255 So. 2d 318 (Miss. 1971) (representing indigent defendants is condition to privilege of practicing law in Mississippi); MISS. CODE ANN. § 99-15-15 *et seq.* (1972) with reference to appointment. The creation of the office of public defender by local and private laws in some counties and pursuant to MISS. CODE ANN. § 25-32-1 *et seq.* (1972) minimizes the importance of appointment of lawyers to represent indigent defendants in counties with such an office .

[93] MISS. CODE ANN. § 73-3-37 ("It is the duty of attorneys: . . . (7) Never to reject, for any consideration personal to themselves, the cause of the defenseless or oppressed").

[94] ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 6.1; MISSISSIPPI RULES OF PROFESSIONAL CONDUCT, Rule 6.1.

[95] *See, e.g.*, Gaetke, *supra* note 50, at 83 ("If pro bono service is an important component of a lawyer's obligation to society, the law must oblige all lawyers to conform").

[96] ABA Comm'n Rep. *supra* note 9, at 49.

F. Living in the Law

In his article with this title, Professor Anthony T. Kronman provides an eloquent statement of professional excellence.[100]

> . . . [T]o be a lawyer is to be a person of a particular sort, a person with a distinctive set of character traits as well as an expertise. I believe that something like this is true, in a general way, of other professions as well and that the very notion of a profession — as distinguished from a mere technique — implies the possession of certain character-defining traits or qualities.[101]

The character trait that best defines the professional lawyer is good judgment.

> To achieve competence in the practice of law one must, of course, master a considerable body of doctrine and be familiar with the distinctive forms of argument the law employs. The truly distinguished lawyer, however, the one who is recognized

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[97] HALLIDAY, BEYOND MONOPOLY, LAWYERS, STATE CRISES AND PROFESSIONAL EMPOWERMENT 368 (1987).

[98] Even though voluntary, the Mississippi State Bar's pro bono effort is substantial. Over 1,000 lawyers have agreed to participate in providing free legal assistance through the Bar's Mississippi Pro Bono Project. For 1990-91 the Mississippi Bar Foundation awarded grants in excess of $150,000 to the Pro Bono Project and six Mississippi Legal Services offices. The funds were generated through the voluntary participation of lawyers in the IOLTA (Interest on Lawyers Trust Account) Project. Interview with Larry Houchins, Executive Director, Mississippi State Bar, Dec. 11, 1990; *Mississippi Bar Foundation 1990 IOLTA Grant Recipients*, THE MISS. LAW. 16 (Oct./Nov. 1990).

[99] The Mississippi State Bar would be the natural vehicle for such an effort since all resident attorneys practicing in the State are required to be members. MISS. CODE ANN. § 73-3-103 (1972).

[100] Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987).

[101] *Id.* at 841 (footnotes omitted).

> by his or her peers in the profession as an exemplary practitioner and whose work is marked by subtlety and imagination, possesses more than mere doctrinal knowledge and argumentative skill. What sets such a lawyer apart and makes him a model for the profession as a whole is not how much law he knows or how cleverly he speaks, but how wisely he makes the judgments that his professional tasks require.[102]

As Counselor. A clever and knowledgeable lawyer may be able to address a client's objective and whether it is obtainable by legal means. However, the client is often beset by confused or conflicting ends and

> [t]he wise counselor is one who is able to see his client's situation from within and yet, at the same time, from a distance, and thus to give advice that is at once compassionate and objective. The merely clever lawyer, the hired gun, is incapable of giving such advice, and though clients may rely upon his tactical assessments, they are unlikely to seek his counsel, or value his judgment, in matters where practical wisdom is required.[103]

The lawyer as a counselor is called upon, not just as a technician to perform the legal objective, but also to help the client understand what it is he wishes to do and to decide whether, on reflection, he really wants to do it.

As Architect. The client who seeks to undertake a business or other venture, involving other persons, seeks a lawyer's assistance in providing a framework for the relationship.

> [I]t is the lawyer's job — or the job of several lawyers working together . . . to find, or rather to invent, a framework of rights and obligations that will accommodate the different and frequently conflicting interests of those involved. The framework in question, whether it takes the shape of a partnership or contract or corporation, may quite properly be described as a community of sorts and the lawyers working to create it must know not only what the law allows and their own clients wish, but what the other members of the community want as well.[104]

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[102] *Id.* at 861-62.

[103] *Id.* at 866.

[104] *Id.* at 866-67.

It is a task that can only be performed well by persons who have good judgment — "the combination of sympathy and detachment that makes it possible to hold in view a range of different interests and to anticipate, in imagination, those arrangements most likely to preserve some measure of amicability among them."[105]

As Advocate. The traits of character and good judgment are essential to the advocate.

While cunning and knowing what persuades are important, the personal character of the speaker "may almost be called [his] most effective means of persuasion."[106] Although the advocate typically argues before strangers and the ceremonies of the law tend to conceal rather than accentuate character, and though he may be intermittently successful in keeping it from view, the advocate's character "is likely to show through in most of what he does. Living out of character for any period of time is like living out of one's own skin, and about as difficult."[107]

The person whose opinion (and legal argument) is respected is the person of good judgment.

The good judgment that an advocate requires includes the same sort of detached and compassionate consideration the lawyer brings to his role as counselor. He must frame his arguments

> . . . so as to emphasize the congruence between his client's interests and the interests of the legal community as a whole. Every good judge knows the difference between a wise argument and a merely clever one. A clever argument shows inventiveness in the way it uses legal and other materials to promote a client's cause. A wise argument establishes a convergence between that cause and the community of law, the community the law both expresses and sustains and whose existence it is the special obligation of judges to protect.
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> . . .
>
> Wise arguments . . . win cases, and if you are an advocate, the

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[105] *Id.* at 867.

[106] *Id.* at 869 (quoting ARISTOTLE, RHETORIC 1356a). Dr. Pellegrino asserts that competence and character are inseparable and that failings in the professions are not in the language of professional codes, but rather are failings in character. Pellegrino, *supra* note 44, at 71-72.

[107] Kronman, *supra* note 100, at 869-70.

> only way to ensure that your arguments exhibit wisdom with any regularity is to acquire the habit of looking at your client's case from the point of view of a judge whose job it is to superintend the legal system as a whole.[108]

Professor Kronman counts good judgment as a professional ideal for lawyers, "a virtue that gives meaning and dignity to their craft precisely because the craft itself cannot be practiced well without it."[109] He continues:

> To the question, then, of why one would ever choose to spend a lifetime in the law the following answer might be given. To live *in* the law, rather than *off* it, is to submit to its discipline and to accept its ideals. Among these ideals is the attainment and exercise of good judgment or practical wisdom. To possess good judgment, however, is not merely to possess great learning or intelligence, but to be a person of a certain sort, to have a certain character, as well.
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> . . .
>
> . . . [t]he character that lawyers achieve if they live up to their professional ideals is itself an accomplishment of value marked by the attainment of a central human excellence.[110]

VI. CONCLUSION

Call it business or profession, the practice of law is a meaningful and worthwhile vocation — both for the individual and society. In fact, absent revolutionary change in our system of administration of law, the lawyer is essential to the preservation of order and justice in society. This article has attempted to focus on what lawyers and the bar mean when they call for "professionalism," on those attributes that give meaning and a sense of personal worth to the individual who practices law well. Good lawyers — whether they represent plaintiffs or defendants in litigation, do title work, draw contracts and practice only in the office, represent individuals, corporations or government, work as house counsel, government employee or private practitioner

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[108] *Id.* at 871.

[109] *Id.* at 873.

[110] *Id.* at 873-74.

— take pride in being a part of the legal profession. That pride arises from a 2000-year-old tradition of paramount commitment to client service by individuals trained not only in the specialized learning of the law but also in the ability to deal with the knowledge and learning of other intellectual disciplines, and always with an obligation to preserve integrity in the administration of justice. In the face of the challenges of inevitable change, lawyers and the organized bar are actively seeking to preserve the professional tradition, and maintain the standards that are the source of professional pride. In days gone by, younger lawyers may have been exposed in the educational setting to ethical rules of conduct and aspirational statements about the profession, but I think most younger lawyers found their professional values in attempting to emulate older members of the bar whom they respected. No doubt older lawyers continue to be exemplars of professional excellence to younger lawyers, but no doubt either that the current discussion of professional responsibility by legal educators has resulted in an articulation of standards of excellence that far exceeds in quality and quantity that available to earlier generations of lawyers. This heightened focus on— and improved understanding of — the professional ideal may be the bar's best assurance of preserving the professional tradition.

Writing in the early 1900s, a commentator on the early history of the Ole Miss Law School said:

> Pettifoggers may get into the ranks. The profession may, in a sense, be commercialized and in a measure for some, it may be reduced to a trade. But so long as a recognized standard of ethics be maintained, the spirit of the law for higher purposes will abide.[111]

And so long as recognized standards of professional excellence be maintained, the spirit of lawyers to preserve the higher callings of the professional tradition will abide.

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[111] Unpublished manuscript by Charles Bowen Howry, an 1867 University of Mississippi law graduate who practiced law in Oxford and had a distinguished career as a public official and Judge of the United States Court of Claims. Quoted in Hemleben & Bennett, *A Historical Sketch of the Early Law School of the University of Mississippi: A Newly Found Memoir*, 37 Miss. L.J. 28, 54 (1965).

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COMMENT

SURVEY OF ETHICAL CONSTRAINTS ON CONTINGENT FEE CONTRACTS IN MISSISSIPPI

I. INTRODUCTION

Contingent fees for legal services are a unique feature of American jurisprudence.[1] England, parts of Canada, and most of the rest of the world prohibit such fee arrangements.[2] In fact, most American jurisdictions termed such agreements champertous until the late nineteenth century.[3] Concerns about spawning frivolous litigation and the impact such contracts would have on the reputation of the legal profession prevented the sanctioning of contingent fee contracts until 1908.[4] In that year the American Bar Association adopted its Canons of Professional Ethics.[5]

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[1] C. WOLFRAM, MODERN LEGAL ETHICS 526-27 (1986) (contingent fees are fixture of attorney-client relationship in America but unusual in other parts of world).

[2] *See* Wallensteiner v. Moer (No. 2) 1 Q.B. 373, 384 (1975) (contingency fees are prohibited in English courts); *In re* Solicitor, 1 K.B. 302, 315 (1912) (attorney who charged percentage of recovery for debt collection is guilty of professional misconduct).

[3] *See, e.g.*, Scobey v. Ross, 13 Ind. 117, 124 (1859) (agreement whereby attorney receives percentage of claim is champertous); Backus v. Byron, 4 Mich. 535, 553 (1857) (agreement that gave attorney percentage of property or cash recovered was champertous); Lathrop v. Amherst Bank, 50 Mass. 489, 492 (1845) (contingent fee contract with attorney is champertous). *See generally* WOLFRAM, *supra* note 1, at 527 (contingent fees were thought to create unwanted litigation).

[4] WOLFRAM, *supra* note 1, at 527.

[5] *American Bar Association Canons of Professional Ethics*, 33 ABA REP. 80, 579 (1908)[hereinafter *Canons of Professional Ethics*].

Canon thirteen authorized the use of contingent fee contracts.[6] However, the ABA adopted it only after heated debate.[7] One commentator said ". . . careful Victorian lawyers gave it the same reception as they gave to ballroom dancing: that the masses engaged in it and the police did not intervene only meant that it was lawful. It hardly assured its respectability."[8]

The Case for Contingent Fees

There are several valid justifications for the use of contingent fees. Perhaps the most appealing is the economic argument. Individuals who otherwise could not afford legal assistance should be able to employ the "present economic value" of any possible future recovery to hire an attorney.[9] Contingent fees also allow a litigant to spread the risk of loss in litigation.[10] Finally, some argue that the use of contingent fees promotes effective advocacy by binding the economic and personal interests of the attorney with the client.[11]

The Case Against Contingent Fees

Arguments against contingent fees center on either their contingent or percentage nature.[12] Some argue that the contingent nature of such an arrangement spawns frivolous litigation because the client has a smaller stake in the success of his claim.[13] Additionally, such fees may result in a conflict between the economic interests of the attorney and the client. As the attorney's compensation is not gauged to the number of hours worked he has an incentive to settle quickly, even if this is not in his client's best interest.[14] The speculative aspect of contingent fees also reduces the legal profession to a "mere business." The attorney is no longer an advisor and advocate but an actual partner in the underlying litigation.[15]

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[6] *Canons of Professional Ethics*, *supra* note 5, Canon 13.

[7] *See* E. SUTHERLAND, HISTORY OF THE AMERICAN BAR ASSOCIATION AND ITS WORK 111 (1953) (many felt sanctioning contingent fees would degrade profession). The original proposal for the canon warned that contingent fees "lead to abuses and should be under the supervision of the court." 33 ABA REP. 61 (1908). After a good deal of debate, the canon was modified to read "[contingent fees] should be under the supervision of the court, in order that client may be protected from unjust charges." 33 ABA REP. 80 (1908). However, in 1933 the ABA softened the canon by removing the reference to unjust charges. 58 ABA REP. 161 (1933).

[8] WOLFRAM, *supra* note 1, at 527.

[9] *See* Valentino v. Rickners Rhederei, G.M.B.H., 417 F. Supp. 176, 181-82 (S.D.N.Y. 1976) (contingent fee represents present value of claim), *aff'd*, 552 F.2d 466, 470 (2d Cir. 1977).

[10] WOLFRAM, *supra* note 1, at 528; *see* Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125, 1150-55 (1970) (discussion of effect of risk spreading on availability of counsel).

[11] S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LEGAL ETHICS, 114 (2d ed. 1989). *See generally* Dover, *Contingent Fees: An Economic Analysis*, 51 J. AIR L. & COM. 531, 538-46 (excellent discussion of economic effect in favor of contingent fees).

[12] Dover, *Contingent Percentage Fees: An Economic Analysis*, 51 J. AIR L. & COM. 531, 546 (1985).

The percentage nature of such fee arrangements also poses problems. There is an increased risk of overreaching by the attorney because the percentage is set in advance of settlement or trial. An unsophisticated client may not carefully consider or comprehend the size of the fee.[16] A percentage fee is not necessarily related to the amount of work performed by the attorney. As such, the attorney's fee may be excessive and deny the client part of his rightful recovery.[17] Finally, some have argued that contingent fees result in unreasonably large jury awards. This conclusion assumes that juries take into account the deduction of the attorney's fees and attempt to adjust the recovery upwards to compensate.[18]

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[13] *See* WOLFRAM, *supra* note 1. If the client loses the litigation his only costs are his time and possible court fees. As such he may be willing to pursue a marginally valid claim on the slim hope of recovery. With little or no capital outlay his risk is minimal. Although most attorneys would refuse to take a single possibly frivolous claim, by taking a large portfolio of such suits an attorney has a statistically greater chance of economic viability. Thus claims which otherwise might not be filed survive due to risk spreading ability of the contingent fee utilized by the plaintiff's attorney.

[14] Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 543-46 (1978). As the attorney does initial work on a claim its value increases. However, at a certain point maximum value is achieved and additional work by the attorney reduces his recovery. Schwartz & Mitchell, *supra* note 10, at 1133. The incentive for the contingent fee attorney is to reach the point of maximum personal profit and then settle the claim. Clermont & Currivan, *supra* at 544.

[15] Clermont & Currivan, *supra* note 14, at 570; *see* Dover, *supra* note 12, at 547 n.123. Dover argues that this idea is an outgrowth of a medieval concept that attorneys are public servants and any fee is a mere honorarium. *Id.* However, it is clear that contingent fees do increase the attorney's interest in seeing an actual recovery and this may not always be the most just outcome. *See* Comment, *Are Contingent Fees Ethical Where Client is Able to Pay a Retainer*, 20 OHIO ST. L.J. 329, 334-36 (1950) (recognizing tremendous economic and social benefits that contingent fees offer indigents).

[16] Dover, *supra* note 12, at 546. An unsophisticated client might not realize the gravity of assigning one-third of his potential recovery. This is especially true if his claim is meritorious and he might find less expensive representation elsewhere. The inability of many plaintiffs to assess the validity of their claim can result in the acceptance of an unnecessarily high contingent fee. Of course, an attorney is required to limit his fee to a reasonable amount with an unsophisticated client. *See generally infra* note 48 and accompanying text (factors to be considered in determining reasonableness of fee).

[17] Dover, *supra* note 12, at 550. Some claims are so meritorious that they will require little or no work by the attorney to reach a successful settlement. In this case the percentage fee might be substantially higher than an hourly one. *Id.* Under a percentage recovery, the extent of the client's injury, not the number of hours worked, determines

How Contingent Fees Work

If it were legal to buy and sell choses of action a plaintiff could sell part of his tort claim and use the proceeds to finance litigation.[19] However, such practices are almost universally prohibited by statutes outlawing champerty.[20] Thus without a legally assignable interest, plain-

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the fee. Grady, *Some Ethical Questions About Percentage Fees*, LITIGATION, Summer 1976, 20 20-21

[18] Thomas, *Contingent Fees: A Case Study for Malaysia*, 10 ANGLO-AM. L. REV. 37, 42 (1981). Some commentators claim there is no empirical evidence to support this claim. Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 OHIO ST. L.J. 158, 176-77 (1958).

[19] Very few courts have allowed this. *See, e.g.*, Grossman v. Schlosser, 19 A.D.2d 893, 244 N.Y.S.2d 749, 751 (1963). *Grossman* allowed a total assignment of proceeds in a personal injury action. The court drew a tenuous distinction between the assignment of the cause of action which was illegal under New York statutory law and the assignment of the proceeds of an action. *Id.* at 750-51. *See generally* Goetz, *Commentary on "Towards a Market in Unmatured Tort Claims": Collateral Implications*, 75 VA. L. REV. 413, 415-22 (1989) (criticism of proposal to allow sale of unmatured tort claims); Annotation, *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R.4th 82, 104-05 (1984) (discussion of cases in which courts have allowed assignment of proceeds from tort suit to other than client's attorney).

[20] *See* MISS. CODE ANN. § 97-9-11 (Supp. 1990). Section 97-9-11 provides:

> It shall be unlawful for any person, firm, partnership, corporation, group, organization, or association, either incorporated or unincorporated, either before or after proceedings commenced: (a) to promise, give, or offer (b) to receive or accept, or to agree or conspire to receive or accept, (c) to solicit, request, or donate, any money, bank note, bank check, chose in action, personal services, or any other personal or real property, or any other thing of value, or any other assistance as an inducement to any person to commence or to prosecute further, any proceeding in any court or before any administrative board or other agency, regardless of jurisdiction; provided, however, this section shall not be construed to prohibit the constitutional right of regular employment of any attorney at law or solicitor in chancery, for either a fixed fee or upon a contingent basis, to represent such person, firm, partnership, corporation, group, organization, or association before any court or administrative agency.

Id. However, MISS. CODE ANN. § 97-9-23 (1972) further excludes contingent fee contracts from the prohibition against champerty:

> The provisions of sections 97-9-11 to 97-9-23 shall not be applicable to attorneys who are parties to contingent fee contracts with their clients where the attorney does not pay or protect the client from payment of the costs and expenses of the litigation. . . .

tiffs cannot offer a bank or financial institution any enforceable security interest with which to secure a loan.[21] By allowing a client to contract with his attorney for a percentage of an expectancy, the client obtains representation without an initial capital outlay. The attorney is paid a percentage of any settlement or recovery.

Attorneys typically utilize three methods to make contingent fee contracts economically feasible. The first is the most obvious one of only accepting "good cases." Second, most contingent fee contracts contain a rising percentage of compensation. Thus an attorney might recover 20% for a settlement prior to filing suit, 30% for settlement prior to trial, 40% for recovery at trial, and 50% if a successful appeal follows.[22] The third is to develop a balanced portfolio of contingent fee cases thereby increasing the statistical probability of net recovery.[23]

Attorneys calculate contingent fees out of what is known as the "multiplicand."[24] The multiplicand is the base from which any percentage is taken. Multiplicands vary from case to case and should be

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> . . . Nothing in Sections 97-9-11 to 97-9-23 is intended to be in derogation of the constitutional right of real parties in interest to employ counsel or to prosecute any available legal remedy. The intent, as herein set out, is to prohibit and punish, more clearly and definitely, champerty, maintenance, barratry, and the solicitation or stirring up of litigation, whether the same be committed by licensed attorneys or by others who are not real parties in interest to the subject matter of such litigation.

Id.; *see also* State v. Cabana Terrace, Inc., 247 Miss. 26, 34, 153 So. 2d 257, 258-59 (1963) (statute outlawing champerty does not prohibit valid contingent fee contracts). *See generally* Annotation, *Validity and Propriety of Arrangement by Which Attorney Pays or Advances Expenses of Client*, 8 A.L.R. 3d 1155, 1158 (1966) [hereinafter *Validity and Propriety*] (discussion of impact of champerty statutes on expense advances).

[21] Annotation, *Validity and Propriety*, *supra*, note 20, at 1158. Only an attorney can successfully extricate a plaintiff from this problem. By taking a number of contingent fee cases an attorney is able to balance his risk and thus provide legal services to those who otherwise could not afford representation. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-20 (1981) [hereinafter MCPR]. EC 2-20 states one justification of contingent fees as "they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim." *Id.*

[22] *See* A Study of Contingent Fees in the Prosecution of Personal Injury Claims, 33 INS. COUNS. J. 197, 203-13 (1966) (analyzing relationship between difficulty of claim in relation to size of percentage).

[23] WOLFRAM, *supra* note 1, at 528. As Wolfram points out, this assumes the attorney will accept contingent fee cases on a random basis. However, more experienced attorneys can predict the success of a claim and either settle weak ones early, or refuse to take them altogether. *Id.* at 528 n.19.

[24] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 779 (1st ed. 1983). Webster's defines multiplicand as "the number that is to be multiplied by another." *Id.*

set out clearly in the attorney-client contract.[25] In some instances the percentage is calculated from the gross recovery. It may come from the recovery minus the expenses of the litigation. This is a matter of contract between the attorney and the client. However, many courts have required a reasonable relationship between the percentage of the attorney's fee and the risk attendant at that stage of litigation.[26]

II. Modern Limitations on Contingent Fees

Maine was the last state to resist the legalization of contingent fees.[27] In 1965 it bowed to modernity and repealed the last American statutory prohibition against such arrangements.[28] However, almost all jurisdictions retain some restrictions on the use of contingent fees. The three most prevalent limitations on their use are in criminal defense,[29] domestic relations,[30] and lobbying.[31] Two of these prohibitions are incorporated into Rule 1.5 of the *Model Rules of Professional Conduct*

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[25] Model Rules of Professional Conduct Rule 1.5(c) (1989) [hereinafter MRPC]; *see also* MCPR EC 2-19, *supra* note 21 (as soon as possible after employment attorney should reach clear understanding with client as to how fee is calculated). Often, it is difficult to determine the sum which will serve as the multiplicand. This is especially true if the state has adopted a schedule of periodic compensation for tortious injuries. *See generally* Henderson, *Designing a Responsible Periodic Payment System for Tort Awards: Arizona Enacts a Prototype*, 32 Ariz. L. Rev. 21, 49-57 (1990) (explanation of how attorneys' fees are calculated under one periodic system).

[26] *See, e.g.*, Koehring Co. v. Hyde Constr. Co., 236 So. 2d 377, 386-87 (1970) (court determined that 50% of fee was reasonable considering risk involved as well as low chance of success). *See generally* Jay, *The Dilemmas of Attorney Contingent Fees*, 2 Geo. J. Legal Ethics 813, 835-53 (1989) (analyzing contingent fee in relation to reasonableness of contract, attendant risk, as well as size of recovery, noting *Model Code's* silence in regard to compensation for risk-taking).

[27] Wolfram, *supra* note 1, at 527.

[28] 1965 Maine Laws ch. 333, *amending* 17 Me. Rev. Stat. Ann. § 801 (1964); *see* 17-A Me. Rev. Stat. Ann. § 516 (1975) (Maine's champerty law).

[29] MRPC, *supra* note 25, Rule 1.5(d)(2)(lawyer shall not accept contingent fee for representing defendant in criminal case); *cf.* MCPR, *supra* note 21, EC 2-20 (public policy condemns contingent fees in criminal cases).

[30] MRPC, *supra* note 25, Rule 1.5(d)(1). Rule 1.5(d)(1) states "A lawyer shall not enter into an arrangement for, charge, or collect: any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. . ."; *cf.* MCPR, *supra* note 21, EC 2-20. EC 2-20 provides in pertinent part: "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic matters are rarely justified." As can be seen the *Model Rules* significantly strengthened the prohibition against such arrangements over the equivocal language of the *Model Code*.

[31] Miss. Code Ann. § 5-7-9 (1972).

(*Model Rules).*[32] The third is found in many state statutes.[33]

Criminal Defense

The prohibition against contingent fees in criminal defense is often justified as necessary "because of the danger of corrupting justice."[34] This "danger" is traceable to two ethical concerns. The first is the fear that an attorney might counsel his client against accepting a favorable plea agreement in order to give the attorney a chance at obtaining an acquittal.[35] The second is the concern that linking compensation to acquittal or non-incarceration of the defendant would increase the likelihood of perjury or other misconduct.[36] Critics respond that both these arguments apply just as easily in a civil defense context and many jurisdictions allow civil defendants contingent fee arrangements. Additionally, it is difficult to see why contingent fees are any more likely to promote subornation of perjury in a criminal context than in a civil one.[37]

Divorce Actions

The prohibition against contingent fee contracts in domestic relations cases is more defensible. *Model Rule* 1.5(d)(1) expressly prohibits "any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof."[38] This prohibition echoes the maxim in the Second Restatement of Contracts which renders any contract which encourages divorce or separation unenforceable.[39] The law favors harmonious marriages. If attorneys were allowed to base their fee on the "successful" conclusion of divorce proceedings there would be little incentive (other than moral) to promote reconciliation.

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[32] MRPC, *supra*, note 25, Rule 1.5.

[33] *See, e.g.*, MISS. CODE ANN. § 5-7-9 (1972) (illegal to offer or accept contingent fee for lobbying).

[34] WOLFRAM, *supra*, note 1, at 535-36 (quoting Peyton v. Margiotti, 398 Pa. 86, 156 A.2d 865, 867 (1959)); *cf.* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2647, 2656 (1989) (federal drug forfeiture statute which prohibits criminal defendants in drug trials from using confiscated funds for their defense does not violate sixth amendment). *See generally* RESTATEMENT OF CONTRACTS § 542 (1928) ("A bargain to conduct a criminal case . . . in consideration of a promise of a fee contingent on success is illegal. . . .").

[35] S. GILLERS, *supra* note 11, at 124.

[36] WOLFRAM, *supra* note 1, at 537. There is also a prohibition against contingent fee confidential informants. Many courts have felt that such informants have great incentive to fabricate information and thus convictions based on such information are often overturned. *See* Williams v. State, 463 So. 2d 1064, 1068-69 (Miss. 1985) ("contingency fee confidential informants are almost as detestable as drug offenders they would ferret out"); *see also* Williamson v. United States, 311 F.2d 441, 444 (5th Cir. 1962) (opportunities for abuse by contingent fee informants are manifest).

[37] WOLFRAM, *supra* note 1, at 533 n.43. *See generally* Annotation, *Validity, Construction and Effect of Contract Providing for Contingent Fee to Defendant's Attorney*, 9 A.L.R.4th 191, 194-206 (1981) (discussion of cases that have allowed contingent fees for defendant's attorney).

Although the rule against contingent fee arrangements in divorce proceedings is widely followed,[40] many states allow a "property pursuit exception."[41] This exception allows a contingent fee contract with a client to collect past due alimony and child support payments.[42] However, this exception has been narrowly construed not to allow contingent fee agreements to collect future alimony or child support payments.[43]

Lobbying

The final modern limitation on contingent fee contracts concerns an attorney's work as a lobbyist. Mississippi has a representative statute which prohibits any person from accepting a contingent fee for lobbying activities.[44] The statute prohibits both the offering and the ac-

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[38] MRPC, *supra* note 25, Rule 1.5(d)(1).

[39] RESTATEMENT (SECOND) OF CONTRACTS § 190 comment c (1979).

[40] *See, e.g.*, Avant v. Whitten, 253 So. 2d 394, 396-97 (Miss. 1971) (contingent fee contracts in matrimonial actions are against public policy as well as unenforceable).

[41] Mississippi State Bar, Advisory Ethics Op. [hereinafter MSB Op.] 88 (1983). MSB Op. 88 provided in part:

> Given the reality that the collection of past due alimony and child support obviously occur *after* a divorce, the Committee is persuaded that an attorney pursuing such collection on a contingent fee basis would not be placed in a position of having an incentive to oppose reconciliation between husband and wife because a divorce would have already been granted. Therefore, the Committee concludes that an attorney may ethically enter into a contingent fee contract with a client to collect *past due* alimony and child support payments.

Id. (emphasis in original).

[42] *Id.*; *see* MISSISSIPPI RULES OF PROFESSIONAL CONDUCT Rule 1.5 comment (1987) *reprinted in* Miss. Rules of Court State and Federal, at 525 (1990) [hereinafter MSRPC] (contingent fee contracts allowed for collection of past due alimony and child support).

[43] MSB Op. 88, *supra* note 41. Opinion 88 states "This opinion does *not* approve of contingent fee contracts to collect *future* child support and alimony." *Id.* (emphasis in original).

[44] MISS. CODE ANN. § 5-7-9 (1972). Section 5-7-9 provides:

> No person or firm, association or corporation, or any officer or employee of a corporation, shall employ, appoint or retain any person or firm, nor shall any person or firm accept such employment or retainer with respect to any matters

ceptance of such fees for lobbying efforts in any way connected to the passage, amendment, or defeat of legislation in the Mississippi State Legislature.[45]

III. CONTINGENT FEE CONTRACTS IN MISSISSIPPI

The Mississippi Rules of Professional Conduct

On July 1, 1987, the Mississippi Bar adopted the *Mississippi Rules of Professional Conduct* (*Mississippi Rules*).[46] The *Mississippi Rules* are based on the *Model Rules* and are substantially the same.[47] Mississippi Rule 1.5 governs the imposition of fees by attorneys:

> (a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the

> pending or that might legally come before the legislature of this state, or either house thereof, upon a contingent fee, dependent in any manner upon the passage, defeat or amendment of any such matter or measure by the legislature of this state, or dependent upon the action or failure to act of any committee of the legislature of this state, or of either house thereof, or dependent upon any other contingency whatsoever in connection therewith.

Id. Many states also prohibit attorneys from paying expert witnesses on a contingent fee basis. *See, e.g.*, Dupree v. Malpractice Research, Inc., 445 N.W.2d 498, 500 (Mich. App. 1989) (contingent fee contract whereby attorney agreed to pay medical expert 20% of recovery was repugnant to public policy); *see also* MSRPC, *supra* note 42, Rule 5.4 ("A lawyer or law firm shall not share legal fees with a nonlawyer. . . .").

[45] MISS. CODE ANN. § 5-7-9.

[46] MSRPC, *supra* note 42, Rule 1.5.

[47] Rule 1.5 is the same in the *Mississippi Rules* and the *Model Rules*.

> lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.
>
> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
>
> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee arrangement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.
>
> (d) A lawyer shall not enter into an arrangement for, charge, or collect:
>
> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
>
> (2) a contingent fee for representing a defendant in a criminal case.
>
> (e) A division of fee between lawyers who are not in the same firm may be made only if:
>
> (1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;
>
> (2) the client is advised of and does not object to the participation of all the lawyers involved; and
>
> (3) the total fee is reasonable.[48]

Mississippi Rule 1.5 marks a departure from Disciplinary Rule (DR) 2-106 and (EC) 2-19 and 2-20 which previously governed fee arrangements in Mississippi. Unlike, DR 2-106, Mississippi Rule 1.5 makes explicit the prohibition on contingent fee contracts in domestic relations cases.[49] Perhaps even more significantly, Mississippi Rule 1.5 dictates that all contingent fee contracts be in writing and a statement be presented to the client upon termination of the representation.[50]

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[48] MSRPC, *supra* note 42, Rule 1.5.

IV. A CASE HISTORY OF CONTINGENT FEES IN MISSISSIPPI

All but one of the Mississippi cases which address the ethical constraints on contingency fees were decided under the old Disciplinary Rules and Ethical Canons.[51] However, this does not lessen their importance as most of the disputes in this area have arisen over issues not directly addressed by either the new or the old rules.

Validity of Contingent Fee Contracts

One of the first Mississippi cases to address contingent fee contracts was *Humphries v. McLachlin*.[52] In *Humphries* an attorney represented McLachlin in negotiations to enforce a settlement of an estate of unknown value.[53] Humphries represented McLachlin on a contingent fee basis with a contract specifying the exact percentage of compensation Humphries would receive in the event of recovery. At the insistence of McLachlin, the parties settled. Humphries and the other attorney in the case agreed to take less compensation than the contract called for. However, McLachlin instituted suit in the Lowndes County Chancery Court to set the fee contract aside alleging it was fraudulent or exorbitant.[54] The chancery court set aside the contract and Hum-

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[49] *Compare* MSRPC, *supra* note 42, Rule 1.5 (lawyer shall not charge contingent fee in domestic relations case) *with* MCPR, *supra* note 21, DR 2-106 (no mention of prohibition on contingent fees in domestic cases) *and* MCPR, *supra* note 21, EC 2-20 (contingent fees in domestic relations cases are rarely justified).

[50] MSRPC, *supra* note 42, Rule 1.5(c).

[51] *See, e.g.*, Lowrey v. Will of Smith, 543 So. 2d 1155, 1163 (1989) (interprets effect of *Mississippi Rules* on contingent fee contracts). The MISSISSIPPI RULES OF PROFESSIONAL CONDUCT did not go into effect until July 1, 1987. *Lowrey* was the first case to interpret their effect on contingent fees. *Lowrey*, 543 So. 2d at 1163.

[52] 87 Miss. 532, 535, 40 So. 151, 152 (1906).

[53] *Id.* The court said the estate was of unknown value and the plaintiff's claim was for an indefinite interest. *Id.*

[54] *Id.*; Gwin v. Fountain, 159 Miss. 619, 645, 126 So. 18, 22 (1930), *modified and remanded on other grounds*, 132 So. 559, 559 (1931). In *Gwin*, the Mississippi Supreme Court discussed the duty an attorney owes his client after the formation of the attorney-client relationship. *Id.* The court said:

> The relation of attorney and client is one of special trust and confidence. The law requires that all dealings between them shall be characterized by the ut-

phries appealed.

The Mississippi Supreme Court reversed.[55] The court noted that McLachlin was of legal age when he entered into the contract. Humphries had gone out of his way to explain all contingencies to him and the court found that he understood and accepted the agreement. At the time of fee negotiation there was no confidential relationship between the attorney and the client. Thus, Humphries owed no duty to his client other than honesty and fair play.[56] In closing, the court ad-

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> most fairness and good faith on the part of the attorney. So strict is this rule that dealings between an attorney and his client are held as against the attorney to be prima facie fraudulent, and the attorney, in order to sustain such a transaction which is advantageous to him, has the burden of showing, not only that he used no undue influence, but that he gave his client all the information and advice which it would have been his duty to give if he, himself, had not been interested. . . .Equity will relieve a client from a hard bargain or from an undue advantage secured over him by his attorney.

Id.; *Lowrey*, 543 So. 2d at 1161 (attorney-client relationship is highly fiduciary in nature); *see also* Van Zandt v. Van Zandt, 227 Miss. 528, 538, 86 So. 2d 466, 470 (1956) (fiduciary must exercise utmost in good faith and loyalty). *See generally Recent Decisions*—In re Swartz: *Judicial Regulation of Excessive Contingent Fees in Arizona*, 27 ARIZ. L. REV. 539, 32 (1985) (discussion of judicially imposed ethical limits on percentage retained by attorney); Annotation, *Validity and Effect of Contract for Attorney's Compensation Made After Inception of Attorney-Client Relationship*, 13 A.L.R.3d 701 (1967) (examination of effect existence of attorney-client relationship has on renegotiated fee arrangements).

[55] *Humphries*, 87 Miss. at 535, 40 So. at 152. The court suggested that the claim was the result of the "machinations and misrepresentations" of the executors. *Id.* Apparently they sought to distract McLachlin away from any further examination of the accounts of the estate. *Id.*

[56] *Id.*; *see* Lutz v. Belli, 516 N.E.2d 95, 96 (Ind. App. 1987). In *Lutz* Melvin Belli contracted on a contingent fee basis to represent Mrs. Lutz in a will contest that involved suits in several different states. *Id.* Mr. Belli offered Mrs. Lutz several different fee options but she chose to contract for a contingent fee of 10%. *Id.* at 98. After the litigation ended Mrs. Lutz refused to pay Mr. Belli 10% of the $500,000 recovery. *Id.* at 100. Mr. Belli sued to enforce the contract. *Id.* at 96. The trial court awarded the fee to Mr. Belli and Lutz appealed. *Id.* at 97. Lutz claimed the trial court erred because Mr. Belli failed to prove the fee was reasonable and obtained without undue influence. *Id.* The Indiana Court of Appeals said that contingent fee contracts are obligatory when made in good faith but are closely scrutinized. The court said that one of the most important factors was when the contract was entered into. *Id.* If the contract is created after the inception of the attorney-client relationship it is presumptively invalid and the burden of proof shifts to the attorney to establish its fairness. *Id.* However, if the attorney and the client negotiate at arm's length before the representation the standard changes. *Id.* The court in *Lutz* found this to be the case. *Id.* Thus it refused to inquire into the actual recorded time spent on the case. *Id.* at 98. The pertinent question was whether the contract called for a fee which was "commercially reasonable under the circumstances." *Id.* The Indiana Court of Appeals affirmed the lower court's award of the

dressed the claim that the fee was exorbitant:

> The contract having been freely entered into, between parties of full contracting age, with full knowledge, without any element of fraud, oppression, undue influence, or concealment, we know of no principle of law which would authorize a court to annul it merely because it had proven advantageous and profitable to one of the contracting parties.[57]

Humphries established two important propositions in Mississippi law. First, that contingent fee contracts are valid in Mississippi and will be respected by our supreme court.[58] Additionally, *Humphries* established that our court will not readily question the size of an attorney's compensation under a contingent fee contract as long as it was entered into prior to the representation, was fair on its face, and was not the result of undue influence.[59]

The Effect of Unforeseeable Labor

Two years later the Mississippi Supreme Court again faced the issue of contingent fee contracts. In *Emil Nathan & Co. v. Halsell*,[60] plaintiffs turned over an outstanding claim to a collection agency. The agency forwarded the claim to defendant Halsell, an attorney. The agency stipulated that if Halsell would sue on the claim he could keep 10% of the recovery as compensation.[61] Halsell sued and won a default judgment. However, Halsell was unable to collect the award so he instituted garnishment proceedings against the debtor. After settling the claim, Halsell returned 50% of the recovery to the collection agency and kept the rest himself. Emil Nathan & Co. refused to accept the

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contingent fee to Mr. Belli. *Id.* at 103.

[57] *Humphries*, 87 Miss. at 536-37, 40 So. at 152. *But see* Commission on Legal Ethics v. Gallaher, 376 S.E.2d 346, 349 (W. Va. 1988) (if attorney's fee is grossly disproportionate to services rendered fee is clearly excessive); *cf.* Kirby Hospital v. Liska, 334 N.W.2d 179, 183 (Neb. 1983) (fee is "clearly excessive" when lawyer of ordinary prudence would be left with conviction that fee is in excess of reasonable fee), *remittitur awarded*, 351 N.W.2d 421, 423 (1984). *See generally Current Developments—Contingent Fees*, 2 GEO. J. LEGAL ETHICS 233 (1988) (discussion of enforceability of contract for percentage of recovery).

[58] *Humphries*, 87 Miss. at 536-37, 40 So. at 152. The court said that proper contingent fee contracts carried a "presumption of validity." *Id.*

[59] *Id.* The Mississippi Supreme Court refused to set aside the contract merely because hindsight showed the compensation to be disproportionate to the work required. *Id.*

[60] 91 Miss. 785, 789, 45 So. 856, 856 (1908).

[61] *Emil Nathan*, 91 Miss. at 789, 45 So. at 856.

50% and returned it to Halsell. Halsell then returned the full amount to the debtor and notified Emil Nathan & Co. that it was their responsibility to recover the debt. Emil Nathan & Co. sued Halsell for the full recovery minus the contracted contingent fee of 10%.[62]

The Mississippi Supreme Court held that an attorney cannot charge his client more than the contracted contingent fee. If the attorney recognizes that an unusual amount of labor will be involved in a claim, it is his responsibility to so inform the client at the outset of the representation and seek a renegotiated fee. Additionally, an attorney has no right to return a client's recovery without the client's permission. If he does so, he is liable to his client.[63]

Emil Nathan stands for the proposition that a contingent fee attorney contracts at his own risk in Mississippi. If the amount of work required by the suit turns out to be excessive when compared to the size of the attorney's fee, the attorney suffers the risk. While the attorney may seek a renegotiated fee agreement, the client may refuse to negotiate and the attorney will remain bound by the initial agreement.

May a Client Dismiss a Suit Notwithstanding the Attorney's Contingent Fee?

The problem of differing objectives between an attorney and his client again surfaced in *Zerkowsky v. Zerkowsky*.[64] Seaman Zerkowsky contracted on a 33.3% contingent fee basis with Kennedy, his attorney. Seaman wanted Kennedy to bring suit to obtain an accounting, division, and partition of partnership property he held with his brother Charles Zerkowsky. Kennedy filed suit against Charles and the Adams County Chancery Court dismissed the action.[65] With his client's permission, Kennedy appealed the case to the Mississippi Supreme Court. However, soon afterwards Seaman and Charles reconciled their differences. A short time later, Charles died, leaving Seaman a substantial legacy.[66]

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[62] *Id.*; *see* Jack Cole-Dixie Highway Co. v. Red Ball Motor Freight, Inc., 254 So. 2d 734, 741 (Miss. 1971) (in contingent fee case attorney cannot recover for fair value of services in addition to amount specified in contract).

[63] *Emil Nathan*, 91 Miss. at 789, 45 So. at 856. Once the attorney-client relationship arises, the attorney owes the client a fiduciary duty. *Gwin*, 159 Miss. at 645, 126 So. at 22. Whenever an attorney acts clearly in his own interest during the representation there is a presumption of fraud and breach of duty. *Id.* Clearly, Halsell's conduct in this case was tortious.

[64] 160 Miss. 278, 285, 131 So. 647, 647 (1931).

[65] *Zerkowsky*, 160 Miss. at 284, 131 So. at 647.

[66] *Id.* at 285, 131 So. at 647. The legacy was subject to a $5000 deduction. *Id.* How-

Seaman wrote his attorney and notified him that he no longer wished to pursue the suit against his brother's estate. He offered to pay the cost of dismissing the appeal to the supreme court.[67] Disregarding Seaman's wishes, Kennedy filed a motion to revive the suit against Charles in the name of his executors. Four days later Seaman filed his own motion praying for dismissal of the appeal.[68]

The Mississippi Supreme Court granted Seaman's motion.[69] The court held that a plaintiff has the right to dismiss his suit and discharge a defendant regardless of the consent of his attorney.[70] This is true as long as the plaintiff acts "in good faith, and without collusion for the express purpose of wronging" his attorney.[71] A plaintiff has no obligation to appeal his case. The court said it would be a "useless formality" to require a plaintiff to first discharge his attorney before seeking to dismiss his case over his objection.[72]

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ever, the other legatees agreed with Seaman not to make the deduction. *Id.* It appears they were attempting to make peace and settle family differences. *Id.*

[67] *Id.* at 285, 131 So. at 648. Seaman wrote Brandon & Brandon a letter which read:

> On account of the death of my brother Charles I am writing to notify you of my desire to abide by the decision of the Chancery Court in regard to my case. I do not want to have the suit revived against the Estate & am willing to pay the cost of dismissing the appeal to the Supreme Court. I am taking this action because I do not want to involve the Estate in any litigation or to take any legal action against my relatives I hope to have stated my feeling clearly in this letter.
>
> Very truly Yours
> [Signed] Seaman Zerkowsky

Id.

[68] *Id. See generally* Closen & Tobin, *The Contingent Contingency Fee Arrangement: Compensation of the Contingency Fee Attorney Discharged by the Client*, 76 Ill. B.J. 916 (1987) (analysis of quantum meruit compensation for discharged contingent fee attorneys).

[69] *Zerkowsky*, 160 Miss. at 286, 131 So. at 647.

[70] *Id.*; *see* Collier v. Necaise, 285 So. 2d 778, 782 (1973) (contingent fee contract does not prevent client from settling); Pollard v. Joseph, 210 Miss. 828, 834, 50 So. 2d 546, 548 (1951) (client may not contract away right to settle); Cochran v. Henry, 107 Miss. 233, 244, 65 So. 213, 215 (1914) (contract between attorney and client whereby client is prohibited from settling is unenforceable).

[71] *Zerkowsky*, 160 Miss. at 286, 131 So. at 648 (quoting Mosely v. Jamison, 71 Miss. 456, 459, 14 So. 529, 529 (1894)); *see Mosely*, 71 Miss. at 459, 14 So. at 529 (contingent fee arrangement with attorney does not prevent client from compromising and dismissing suit without attorney's consent). *But cf.* Lamar Hardwood Co. v. Case, 143 Miss. 277, 288, 107 So. 868, 870 (where person assigns part of future recovery to attorney and settles with defendant without his attorney's knowledge, if defendant has notice of attorney's contingent fee, settlement does not affect attorney's right to recover thereon).

[72] *Zerkowsky*, 160 Miss. at 287, 131 So. at 648; *see Collier*, 285 So. 2d at 782 (contingent fee contract does not obligate client to appeal); *Pollard*, 210 Miss. at 834, 50 So. 2d

Zerkowsky shows that a contingent fee contract in no way removes the client's ultimate control of his claim. The attorney's economic stake in the outcome does not make him a party to the suit or the ultimate decision-maker. Notwithstanding a contingent fee contract, a client may compromise or dismiss his claim over his attorney's objection.

Unforeseen Circumstances and Quantum Meruit Compensation

Fitzpatrick v. Kellner[73] dealt with the proper compensation for an attorney. The litigation took an unexpected turn which denied the attorney his contingent fee. In *Fitzpatrick*, Kellner contracted to represent several parties in a will dispute. The contingent fee contract provided that in the event of a recovery Kellner was to receive one-third of property in kind or in money.

The Fitzpatricks were the nieces and sole heirs of Mrs. Kate Archer. Mrs. Archer had contracted with T. B. Stone to manage all her property.[74] In return she conveyed him a one-fourth undivided interest in her property and contracted to leave him another one-fourth undivided interest in the remaining property by will.[75] Several years later Mrs. Archer died. Her will left a one-fourth undivided interest to Stone and a one-fourth undivided interest to the Fitzpatricks. As the sole heirs at law, the Fitzpatricks also inherited the remainder, bringing their undivided interest to one-half. The Fitzpatricks were unaware of these conveyances and thought Stone was in wrongful possession of the property. They believed the bequest in the will was the result of undue influence by Stone. Kellner was employed to set aside the will.[76]

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at 548 (client may not contract away right to appeal); *Cochran*, 107 Miss. at 244, 65 So. at 215 (contract between attorney and client whereby client is forced to appeal is unenforceable).

[73] 187 Miss. 843, 848, 193 So. 911, 912 (1940).

[74] *Fitzpatrick*, 187 Miss. at 848, 193 So. at 912. Mrs. Archer owned approximately $50,000 worth of land in Arkansas and a home in the city of Greenwood, Mississippi. *Id.*

[75] *Id.* The written contract obligated Stone to "take charge of her property and to attend to all 'legal matters' connected therewith." *Id.* The consideration was a contract which bound Mrs. Archer to do two things. *Id.* First, she was to execute a warranty deed to Stone granting him a one-fourth undivided interest in all her property both personal and real except her homestead. *Id.* Second, the contract obligated her to bequeath an additional one-fourth undivided interest in the remainder of her property in her will. *Id.* at 848, 193 So. at 912.

[76] *Id.* at 848, 193 So. at 911. The contract between the Fitzpatricks and Kellner provided:

> This agreement between Miss Adelaide C. Fitzpatrick and Miss Annie Nell Fitzpatrick, Parties of the First Part, and Ernest Kellner, Party of the Second

When Kellner discovered the recorded deed and the earlier contract he informed his clients that any litigation would be fruitless.[77] Kellner knew his services were no longer needed and demanded the Fitzpatricks compensate him with a one-third undivided interest in their one-half interest. The Fitzpatricks refused and Kellner brought suit to enforce his claim.[78] The Washington County Chancery Court granted Kellner's claim and an appeal ensued.

The Mississippi Supreme Court found the contingent fee contract had been made in good faith. There was no suppression of material facts nor undue influence exerted by attorney Kellner. The court noted that if such facts had been found, the contingent fee contract would have been invalid.[79] What makes *Fitzpatrick* important, however, is the result the court reached. The court found that the mutual mistake of facts which all parties suffered under entitled Kellner to reasonable compensation regardless of non-recovery in the underlying suit.[80] Al-

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> Part, witnesseth:
>
> The parties of the First Part hereby employ the Party of the Second Part to ascertain and recover their interest in the estate of Mrs. Kate C. Archer, deceased, and the Party of the Second Part hereby undertakes said employment upon the following understanding:
>
> That in the event the Party of the Second Part is unable to make any recovery for the Parties of the First Part he is to receive no compensation whatever, but the Party of the Second Part is to receive one-third (⅓) of any recovery he shall make for the Party of the First Part, either in kind or in money.

Id.

[77] *Id.* at 849, 193 So. at 912. The suit was based on an allegation of undue influence. *Id.* When Kellner discovered the contract and the deed which had both been recorded several years prior to the probate proceeding, he decided it was best not to continue the suit. *Id.* Stone was only claiming his one-half undivided interest in the property and Kellner felt this interest would be upheld under the contract and earlier deed regardless of the validity of the will. *Id.* at 850, 193 So. at 912.

[78] *Id.* The Fitzpatricks refused to pay Kellner one-third of their undivided one-half interest. *Id.* However, they did offer to pay him reasonable compensation for his work. *Id.* He refused their offer. *Id.*

[79] *Id.* Kellner did not bring a separate suit but rather intervened in the probate action. *Id.* at 847, 193 So. at 912.

[80] *Id.* at 851, 193 So. at 913. The court first inquired into the contingent fee contract itself. *Id.* If it had been found unenforceable this would have ended the suit. *Id.* However, the court found that the contract was valid. *Id.* The factors the court considered were the good faith of Kellner, his disclosure of facts, the fairness of the compensation bargained for, and the lack of undue influence. *Id.* The court denied Kellner recovery under the contract. *Id.* However the court said Kellner was entitled to reasonable compensation for the services he rendered. *Id.* The court did not specify how this was to be determined but it was the first hint that Mississippi recognized recovery in quantum meruit for attorney's fees. *Id.* Quantum meruit compensation for attorneys is recognized in several states. *See, e.g.*, Mercy Hospital, Inc. v. Johnson, 390 So. 2d 103, 103 (Fla.

though the court did not term it as such, this was the first hint that the Mississippi Supreme Court would allow quantum meruit compensation for an attorney who could not collect his contingent fee. *Fitzpatrick* established that an attorney's contingent percentage is not his exclusive remedy. If unforeseen circumstances arise that are serious enough to equate a mutual mistake of facts, our court may set aside the contract and allow quantum meruit compensation.

Does a Contingent Fee Contract Make the Attorney a Party at Interest?

In *Pollard v. Joseph*,[81] the Mississippi Supreme Court again addressed the effect of contingent fee contracts in wills and estates suits. In *Pollard*, decedent T. Joseph left a will devising one-half of all his property to his wife, Mrs. Zine T. Joseph, and one-half to his first son Nawie Joseph. His second son, Meelad was left one dollar. Meelad decided to contest the will and hired the law firm of Pollard & Hammer on a one-third contingent fee contract.[82] The contract provided that the firm would receive:

> . . . an undivided one-third interest in and to all monies and property, real and personal that may be recovered from said estate [by Meelad]. . . in said litigation in full compensation to [Pollard & Hammer]. . . for their services in and about the estate of the aforesaid; and if said estate shall be settled by compromise between [Meelad]. . . and the other interested parties in said estate, then one-third of the amount so received

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Dist. Ct. App. 1980) (failure to establish enforceability of fee contract did not preclude recovery on quantum meruit), *rev'd and remanded on other grounds*, 431 So. 2d 687, 688 (Fla. Dist. Ct. App. 1983). *See generally*, J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION § 59.93 (1990) (estate of deceased contingent fee attorney is entitled to quantum meruit compensation for deceased attorney's work).

[81] 210 Miss. 826, 831, 50 So. 2d 546, 547 (1951).

[82] *Pollard*, 210 Miss. at 831, 50 So. 2d at 547. Meelad's suit alleged the devise of real property to his mother and brother was void because the devisees were nonresident aliens of Mississippi and thus incapable of taking and holding title to real property. *Id.* at 832, 50 So. 2d at 547. MISS. CODE ANN. § 89-1-23 (1972) provided that nonresident aliens could not acquire and hold land. *Id.* However, the statute provided an exception for the citizens of Syria and the Lebanese Republic. *Id.* Meelad contended that this exception violated MISS. CONST. of 1890, art. IV, §§ 84 and 90 which prohibit the enactment of local, private, or special legislation. *Id.* Meelad was a Mississippi resident and would have taken the land by intestate succession if the statute were found unconstitutional and the will thrown out. MISS. CODE ANN. § 91-1-3 (1972) (when person dies intestate his land descends to his children).

> on compromise shall become the property of the second part [Pollard & Hammer] for services rendered in this matter.[83]

After instituting suit and without informing his attorneys, Meelad agreed to convey any interest he had in his father's estate to Mrs. C. Joseph for consideration of $100.[84] Mrs. C. Joseph then filed a motion to dismiss Meelad's bill. When Pollard & Hammer learned of these developments the firm sought to intervene in the suit claiming they had an interest in the estate and that Meelad's conveyance to Mrs. C. Joseph was fraudulent as against them as creditors.[85] The Leflore County Chancery Court sustained a demurrer to the bill of intervention and the law firm appealed.[86]

The Mississippi Supreme Court affirmed.[87] The court found the contract which provided for the law firm to take a one-third interest in any recovery from the estate did not vest in the attorneys any interest in the action. Meelad's express reservation of the right to settle in the fee contract made the contract a contingent fee arrangement and nothing more. As such the law firm had no right of action against the devisee's grantee nor standing to intervene.[88] However, the court was care-

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[83] *Pollard*, 210 Miss. at 833, 50 So. 2d at 547-48. The court noted that the contract did not vest in the attorneys any present interest in the cause of action or the property in litigation. *Id.* It also by its terms recognized the right to settlement. *Id*; *see Mosely*, 71 Miss. at 459, 14 So. at 529 (contingent fee arrangement with attorney does not prevent client from compromising and dismissing suit without attorney's consent).

[84] *Pollard*, 210 Miss. at 832, 50 So. 2d at 547. Apparently this was the second deed Meelad executed. *Id.* In 1941, Meelad deeded all his interest he might have in his father's estate to his mother and his brother. This deed was never recorded and was subsequently lost. *Id.* at 831, 50 So. 2d at 547. The 1949 deed granted Meelad's purported interest solely to Mrs. C. Joseph. *Id.* Meelad's attorneys were not consulted and knew nothing of these transactions. *Id.* at 832, 50 So. 2d at 547.

[85] *Id.* at 833, 50 So. 2d at 547-48. Pollard & Hammer claimed that the fee contract vested them with an interest in the action. *Id. But see Cochran*, 107 Miss. at 244, 65 So. at 215 (contingent fee contract does not give attorney interest in property at issue). *See generally* Annotation, *Assignability of Proceeds of Claim for Personal Injury or Death*, 33 A.L.R.4th 84 (1984) (discussion of differences between assignments and true contingent fees).

[86] *Pollard*, 210 Miss. at 833, 50 So. 2d at 547.

[87] *Id.* at 835, 50 So. 2d at 548.

[88] *Id.* at 834, 50 So. 2d at 547. The court cited *Cochran*, 107 Miss. at 244, 65 So. at 215, as dispositive on the issue. *Id.* The fee contract in *Cochran* expressly prohibited the client from settling the suit without the express consent of the attorney. *Id.* It also provided that the attorney could compromise the case without the client's permission. *Id.* The contract said:

> The intention and purpose of this writing being that I hereby bargain, sell, assign, transfer and set over to the said Pat Henry [attorney] one-half (½) or fifty (50) percent of whatever in lands, moneys, choses in action and personal

ful to point out that Meelad might still be liable to his attorneys under the contract and that this decision had no impact on that potential liability.[89]

Pollard was really a reaffirmance of the principles of *Zerkowsky.* A contingent fee attorney does not have such an interest in a suit so as to prevent compromise or settlement. However, *Pollard* went a step further and held that such a contract does not give an attorney an intervenable interest in the litigation. The real party is the client, not the attorney.

Contingent Fee Contracts in Divorce Actions

Eleven years later the court addressed the issue of quantum meruit compensation for attorneys who could not enforce contingent fee

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> property that I may be entitled to receive by and through [the will involved in the suit].

Id. at 243, 65 So. at 214 at 243. Notwithstanding the clear language of the contract, the *Cochran* court found the client had not vested the attorney an interest in the subject matter of the action and that the provision prohibiting settlement without the attorney's consent was invalid. *Id.* at 244, 65 So. at 216. The *Pollard* court found *Cochran* controlling. *Pollard*, 210 Miss. at 835, 50 So. 2d at 548. *See generally* MSRPC, *supra* note 42, Rule 1.8(j) (attorney shall not acquire proprietary interest in cause of action or subject of litigation except for reasonable contingent fee in civil case and lien to secure attorney's fee or expenses).

[89] *Pollard*, 210 Miss. at 835, 50 So. 2d at 548. The court seems to have implied that Pollard & Hammer could recover the one-third of settlement due it under the contract. *Id.* An interesting related issue is what compensation is due an attorney when he is discharged and the client later is successful with his subsequent counsel. The Superior Court of New Jersey addressed just this question in Anderson v. Conley, 206 N.J. Super. 132, 501 A.2d 1057, 1059 (Law Div. 1985). In *Anderson*, plaintiffs were injured in an automobile accident. *Id.* They engaged the firm of McDonough, Murray & Korn to represent them. *Id.* Later, plaintiffs discharged Korn and retained Aaron J. Broder. Both representations were on a contingent fee basis. *Id.* Before agreeing to hand over the file of the case, Korn had the plaintiffs sign an agreement that upon recovery they would submit to court adjudication (in the absence of agreement) of Korn's fee for the three months of representation plaintiffs received. *Id.* Plaintiffs recovered well over $1,000,000 and Korn sued for compensation. *Id.* at 1060. The court found that the plaintiffs discharge of Korn without cause after three months of representation entitled Korn to recovery on a quantum meruit basis. *Id.* at 1067; *see* Newman v. Melton Truck Lines, Inc., 443 F.2d 896, 897 (5th Cir. 1971) (original counsel who was discharged prior to settlement entitled to compensation on quantum meruit). *But see* Saucier v. Hayes Dairy Products, Inc., 373 So. 2d 102, 118 (La. 1979) (client should only pay one contingent fee percentage to be highest percentage agreed to in any of contingent fee contracts executed by client); *cf.* Phillips v. Smith, 768 P.2d 449, 450-51 (Utah 1989) (under Utah statute attorney's lien did not attach where client discharged attorney and settled lawsuit through use of another firm).

contracts. In *Ownby v. Prisock,*[90] Prisock represented Mrs. Elva I. Ownby for over a year in separate divorce, maintenance, and property settlement suits.[91] Prisock entered into a contingent fee contract with Mrs. Ownby wherein Prisock was to receive 25% of any property settlement. After the conclusion of the representation, Mrs. Ownby refused to pay Prisock's proper fee under the contract.[92] Prisock brought suit in the Hinds County Chancery Court.

Prisock maintained that he had provided valuable services for Mrs. Ownby for over one year and he was entitled to 25% of the property settlement under the contract. In the alternative, if the court found the contract to be unenforceable, Prisock prayed for quantum meruit compensation.[93] The chancellor found the contract to be unenforceable but awarded Prisock $2800 on a quantum meruit basis.[94] Mrs. Ownby appealed.

The sole question before the Mississippi Supreme Court was whether an attorney can take "recovery on a quantum meruit basis where the contract on a contingent fee is held to be void?"[95] The court found that contingent fee contracts in divorce cases were void as against public policy in Mississippi. However, the court cited its decision in *Fitzpatrick* to support the proposition that an attorney may recover on a quantum meruit basis when the underlying contingent contract is found to be unenforceable.[96] The court affirmed the chancellor's award of $2800.[97]

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[90] 243 Miss. 203, 206, 138 So. 2d 279, 279 (1962).

[91] *Ownby*, 243 Miss. at 206, 138 So. 2d at 279. Prisock was successful in his efforts and obtained a divorce decree and property settlement. *Id.*

[92] *Id.* Ownby refused to pay and Prisock brought suit. *Id.* Mississippi has recognized an attorney's lien on a client's recovery. *See* Webster v. Sweat, 65 F.2d 109, 109-10 (5th Cir. 1933) (Mississippi recognizes common law attorney's lien on judgment); Collins v. Schneider, 187 Miss. 1, 10, 192 So. 20, 22 (1939) (attorney has "retaining lien" on money, papers, and writings of client in hand and "charging lien" on judgments, decrees and their proceeds); Chattanooga Sewer Pipe Works v. Dumler, 153 Miss. 276, 290, 120 So. 450, 452-53 (1929) (in absence of showing that contract was unreasonable, attorney had lien on amount recovered under insurance policy to extent of contingent fee). *See generally Phillips*, 768 P.2d 449 (attorney's lien does not attach until commencement of lawsuit).

[93] *Ownby*, 243 Miss. at 206, 138 So. 2d at 279-80. Prisock must have realized that what he had contracted for was unethical. *Id.* As a result he prayed in the alternative for relief in quantum meruit. *Id. See generally* MRPC, *supra* note 25, Rule 1.5(d)(1) (1989) ("A lawyer shall not enter into an arrangement for, charge, or collect: any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof"); MCPR, *supra* note 21, EC 2-20 (1981) ("Because of the human relationships involved and the unique character of the proceeding, contingent fee arrangements in domestic matters are rarely justified").

[94] *Ownby*, 243 Miss. at 206, 138 So. 2d at 280. The Mississippi Supreme Court had earlier hinted in *Fitzpatrick* that quantum meruit was available when a contingent fee contract was unenforceable. *Fitzpatrick*, 187 Miss. at 851, 193 So. at 912; *see, e.g., Newman*, 443 F.2d at 897 (original counsel who was discharged prior to settlement entitled to compensation on quantum meruit). *See generally*, Grantham, *Why Does This River Flow?* In re Cooper *and the Continued Prohibition of Contingency Fees in Divorce Actions*, 65 N.C.L. Rev. 1379-89 (1987) (contingent fee contracts in divorce actions remain void as against public policy notwithstanding compelling arguments to contrary).

If Prisock's contingent fee was merely for the pursuit of marital property owed to Mrs. Ownby it might have been valid under the property pursuit exception. However, regardless of the fact that the three actions were separate, Prisock's compensation for the earlier divorce suit was tied to a contingent fee from the property recovered. Such a contract is clearly void in Mississippi.

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[95] *Ownby*, 243 Miss. at 206, 138 So. 2d at 280. This question had been addressed before in other jurisdictions. *See, e.g.*, Re Estate of Sylvester, Deceased, C. J. Roten, Adm'r v. Tesdell, 195 Iowa 1329, 192 N.W. 442, 447 (1923) (illegal contingent fee contract for divorce did not bar recovery by attorney in quantum meruit); *see also* McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746, 748 (1904) (contingent fee contract in suit against husband for divorce and assault and battery void but attorney entitled to reasonable fee); Annotation, *Re Estate of Sylvester, Deceased, C. J. Roten, Adm'r v. Tesdell*, 30 A.L.R. 180 (1924) (same).

[96] *Fitzpatrick*, 187 Miss. at 851, 193 So. at 912. 5 AM. JUR. *Attorneys at Law* § 178 (1936) states:

> It is generally held that an attorney undertaking to procure a divorce under an illegal contract, basing his right to recovery upon the contingency of obtaining the divorce, may recover the value of his services upon a quantum meruit, although no recovery can be had on a quantum meruit for an attorney's services under a contract to obtain evidence and secure a divorce.

Id. A 1972 Mississippi case reaffirmed that recovery on a quantum meruit is available when the contingent fee contract is found void. *See* Horton v. Horton, 269 So. 2d 347, 349 (Miss. 1972) (contingent fee contract in divorce case is illegal but attorney may recover on quantum meruit); Avant v. Whitten, 253 So. 2d 394, 397 (Miss. 1971) (same). *But see* McCrary v. McCrary, 764 P.2d 522, 525-26 (Okla. 1988) (arrangement between attorney and client whereby client deeded house to attorney's brother-in-law in return for representation in divorce appeal from judgment which awarded house to client was "illegal and void" 100% contingent fee in divorce case and attorney cannot recover). An interesting side issue involves attorney malpractice. Some recent cases have deducted a quantum meruit measure from the damages owed by a negligent attorney to his client. *See generally* Cohen, *The Deduction of Contingent Attorney's Fees Owed to the Negligent Attorney from Legal Malpractice Awards: The New Modern Rule*, 24 TORT & INS. L.J. 751, 759-62 (1989) (deduction of quantum meruit measure from damages owed by negligent attorney).

[97] *Ownby*, 243 Miss. at 208, 138 So. 2d at 280. The court cited City of Louisville v. Chambers, 190 Miss. 833, 839, 1 So. 2d 771, 772 (1941). In *Louisville*, the court held that the reasonableness of an attorney's fee for services rendered in connection with a matter was for the chancellor to determine. *Id.* The *Louisville* court held that if the fee was supported by substantial evidence it would not be disturbed on appeal. *Id.*; *see also* Brown v. Franklin, 166 Miss. 899, 905, 145 So. 752, 754 (1933) (absent clear abuse of judicial discretion Mississippi Supreme Court will not alter chancellor's award of attorney's fees).

Judicially Imposed Contingent Fee Contracts

The Mississippi Supreme Court took a unique approach in *Koehring Co. v. Hyde Construction Co.*[98] In *Koehring*, several attorneys represented Hyde Construction in over ten years of complex litigation arising out of the construction of a large concrete mixing and cooling plant near Tulsa, Oklahoma.[99] The firm of Cox, Dunn & Clark (Dunn) originally contracted to represent Hyde on a "reasonable fee basis" (presumably hourly billing).[100] However, after years of litigation involving thirty-nine different judges in nine different courts, Hyde was insolvent.[101] At the conclusion of this tangled web of litigation, the Hinds County Chancery Court awarded the plaintiff's attorneys a contingent fee based on implication of contract. The fee consisted of 50% of the gross judgment including interest to the date of its payment or $300,000 whichever sum was greater (plus 6% per annum on whichever sum was payable calculated from the date of the decree to the date of the distribution).[102]

An appeal ensued in which three main issues were considered by the Mississippi Supreme Court. Appellants contended that the award of contingent fees was improper due to the lack of any such contract between the attorneys and the now insolvent plaintiff. Second, appellants argued that if such a fee was to be allowed it should only be calculated after the deduction of expenses from the judgment. Finally, appellants insisted that the fees of additional attorneys employed by Dunn should be paid out of the fee allowed Dunn, and not counted as an expense.[103]

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[98] 236 So. 2d 377, 387 (Miss. 1970).

[99] *Koehring*, 236 So. 2d at 382-83. Hyde Construction Company contracted with Koehring for the latter to design, construct,and install a concrete cooling and mixing plant for use on the Keystone Dam Spillway project near Tulsa, Oklahoma. *Id.* at 383. Hyde and Koehring had a dispute over performance of the contract and Hyde employed Dunn to negotiate a settlement. *Id.*

[100] *Id.* at 385-86. The court does not define what a "reasonable fee" basis means. However, it implied that this means hourly billing. *Id.*

[101] *Id.* Upon insolvency, Hyde's assets were assigned to U.S.F. & G., Hyde's bonding company. *Id.*

[102] *Id.* at 379. The Hinds County Chancery Court also awarded Dunn expenses in the amount of $43,237.61 plus interest on the rate of 6% per annum. *Id.*

[103] *Id.* at 384-85. U.S.F. & G. argued that the Keystone project was actually a part-

In response to appellant's first contention the court said:

> The litigation preceding this judgment and subsequent thereto has been bitterly contested. There was no assurance that a judgment could be obtained in the first instance nor that it could be collected thereafter. The risk of loss, labor and personal finances by the attorneys was great. Under the peculiar facts and circumstances of this case we are of the opinion that their services were out of the ordinary and were performed under unusual and trying circumstances which requires us, in justice, to conclude that the fee was highly contingent and that the award was properly made on that basis.[104]

However, the court agreed with the appellants' second contention. The court stated that unless a contract specifies otherwise, a contingent fee percentage should be calculated from the amount actually recovered by the client. Thus expenses must be deducted first. There was no contract for a contingent fee in this case, so the court found that the presumption for percentage of net recovery controlled.[105]

Appellants also persuaded the court on their third point. The court said that as a general rule an attorney hired on a contingent fee basis has no implied authority to hire additional counsel at his client's expense.[106] Although he may hire such counsel, the cost falls on the

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nership composed of E.E. Morgan and R.W. Hyde. E.E. Morgan was solvent and could pay Dunn's fee. The court rejected this argument and found that Dunn was the client of Hyde Corporation (now insolvent), not Morgan or Hyde individually or as partners. *Id.* at 385.

[104] *Id.* at 386. The court noted that after Hyde became insolvent the only possible way Dunn could be compensated was by receiving a percentage of the potential recovery. *Id.*

[105] *Id.* The court, citing 7 C.J.S. *Attorney and Client* § 191b (1937), stated:

> The percentage coming to the attorney is usually reckoned on the amount actually recovered by the client, and not on the amount of the judgment, unless the language of the contract is such to justify such an interpretation. The amount actually recovered, within the meaning of this rule, is the net amount allowed by the judgment less the amount of any claim, expense, or offset that may properly be deducted therefrom.

Id.; *cf.* Luna v. Gillingham, 789 P.2d 801, 804-05 (Wash. App. 1990) (contingent fee contracts which demand percentage of gross recovery are strictly construed against attorney).

[106] *Koehring*, 236 So. 2d at 386-87. U.S.F. & G. cited two cases to support its argument that a contingent fee attorney has no implied authority to hire and charge his client for additional counsel. *Id.* at 387. In Whitlow's Administrators v. Whitlow's Administrators, 109 Ky. 573, 60 S.W. 182, 184 (1901), the Kentucky court held that where a contingent fee contract provided for the deduction of "necessary expenses" prior to the

attorney and not the client unless expressly agreed to the contrary.[107] The court then held that a contingent fee which arises by implication of law and contract cannot exceed 50% of net recovery.[108]

Koehring established three important principles. First, Mississippi law does recognize a contingent fee contract by implication of law in certain limited circumstances. Second, in the absence of an express stipulation to the contrary the multiplicand is net, not gross recovery. Finally, *Koehring* adopted the general rule that a contingent fee attorney has no implied authority to hire additional counsel at his client's expense.

Obligation to Appeal

In *Collier v. Necaise*,[109] the issue was not the equities of allowing a contingent fee, but rather the constraints such a contract places on the client. Vivian Collier and two others hired Cornelious J. Ladner to represent them in a suit to set aside a conveyance as fraudulent.[110] In return for his services Ladner was to receive one-third of the value of the land if recovered.[111] Ladner filed suit in Hancock County and lost

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calculation of the attorney's portion, the fees of additional counsel employed by the attorney could not be deducted as a necessary expense. *Id.* Also in Snyder v. Howard Administratrix, 251 Ky. 592, 65 S.W.2d 477, 479 (1933) the court stated: "The rule is well settled that where a lawyer takes a case on a conditional fee he cannot employ other counsel and charge this to his client without the client's consent." *Id. See generally* Simon, *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1076-84 (1989) (discussion of historical limitations on fee sharing).

[107] *Koehring*, 236 So. 2d at 387. Of course, an express agreement to the contrary could not be found here because there was no contingent fee contract at all. *Id.* at 386. *But see, e.g.*, Allard v. First Interstate Bank of Washington, 112 Wash. 2d 145, 153 768 P.2d 998, 1001 (where contingent fee contract provided that outside counsel might be required award of such fees was proper), *modified*, 773 P.2d 420 (Wash. 1989). *See generally Recent Developments—Attorney's Fees*—Hoddick, Reinwold, O'Connor & Marrack v. Lotsof: *Highest Ethical Contingency Percentage*, 9 U. HAW. L. REV. 793-807 (1987) (analysis of ethical constraints on fee splitting when case involves multiple attorneys on contingent fee contracts).

[108] *Koehring*, 236 So. 2d at 387.

[109] 285 So. 2d 778, 779 (1973).

[110] *Collier*, 285 So. 2d at 779. The clients were Vivian Collier, Harold Stiglet, and Norma Stiglet. *Id.* at 778. They wished to set aside a conveyance from Vivian Collier to Mrs. Eloise Collier Necaise on the grounds that the deed had been fraudulently obtained. *Id.* at 778-79.

[111] *Id.* at 780. The contingent fee contract provided: "It is understood and agreed by and between all parties to this instrument that the fees hereinabove set forth are contingent upon recovery and should there be no recovery of any sum of money, then no compensation shall be due and owing said Attorney." *Id.* at 779.

on the merits.[112]

Collier and the others wrote Ladner and expressly told him not to file an appeal as they did not want to go through the stress of another trial with little chance of success. Collier sent copies of the letter to the chancellor and the chancery clerk.[113] In contravention of his client's wishes, Ladner attempted to file an appeal. The chancery clerk initially refused to comply but finally relented after a threat letter from Ladner.[114]

The Mississippi Supreme Court faced the question of whether a contingent fee contract can give an attorney such an interest in an action to allow an appeal by the attorney against the express wishes of his clients. The court found that a valid contingent fee contract does not give an attorney such an interest in a cause of action so as to prevent the client from settling or dismissing the suit without the attorney's permission.[115] A normal contingent fee contract does not obligate a client in any way to conduct an appeal.[116]

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[112] *Id.* The chancellor found the bill of complaint had not been proved and dismissed it with prejudice. *Id.*

[113] *Id.* The letter said:

> Mr. Cornelious J. Ladner, Attorney
> Main Street
> Bay St. Louis, Mississippi
> Dear Mr. Ladner:
> RE: Vivian Taconi Collier
> et al
>
> We have decided that we do not want to take an appear (sic) in the above case which you have been handling for us.
>
> The Chancery Judge rendered a decision in favor of the defendant and we are willing to abide by his decision. We understand the cost of an appeal is high and we have no guarantee of winning. Also, we could be faced with the possibility of another trial and we do not believe that the health of os (sic) the undersigned, Vivian Taconi Collier, would permit her to testify.
>
> We feel that the trial itself was an ordeal and we would not want to have to repeat that.
>
> Please do not take any steps toward appealing the case.
>
> Thanking you, we are,
> Mark: *Vivian Taconi Collier*
> *Norma C. Stiglet*
> *Harold Stiglet*
> CC: Judge Hewes
> Austin Malley, Court Reporter
> John Rutherfore, Sr. Chancery Clerk
> WITNESS: *George Anderson*
> WITNESS: *Janet Anderson*

Id.

[114] *Id.* at 781. The clerk initially wrote Ladner a letter returning his $300 check which he had paid for the preparing of the transcript for appeal. *Id.* at 780. The clerk stated that it was his opinion that Ladner could not appeal without his client's consent. *Id.* Ladner sent the check back to the clerk with a very rude letter in which he threatened to sue the clerk if the clerk did not file his appeal. This time the clerk complied. *Id.* at 780-81.

Collier is the third component of the *Pollard* and *Zerkowsky* line of decision. A client does not relinquish any control of his suit by entering a contingent fee agreement. Not only may he compromise or dismiss the action, but he may refuse to appeal over his attorney's objection. This may not release the client from some sort of liability to his counsel but it does mean that the ultimate decisions about the conduct of the suit always remain in the client's hands.

Written Versus Oral Contingent Fee Contracts

Several years passed after *Collier* before the Mississippi Supreme Court had the opportunity to decide a contingent fee case under the new *Mississippi Rules of Professional Conduct.* That opportunity presented itself in *Lowrey v. Will of Smith.*[117] In *Lowery*, the court recognized and then proceeded to ignore the impact of Mississippi Rule 1.5 on the legitimacy of oral contingent fee contracts. Danny L. Lowrey and his wife Mary Ann had lived in the same apartment complex as David Carter Smith and Lois Elizabeth Vinson Smith while Lowrey was in law school.[118] After graduation from law school, Lowrey represented the Smiths in several matters.

Mr. Smith had Alzheimer's disease and he and his wife were advanced in age. Mrs. Smith approached Lowrey and asked him to become a signatory with full right of survivorship on her checking account. She was concerned that she and her husband might become incapacitated and wanted Lowrey to take care of any possible contingencies out of the account. In compensation she allegedly told Lowrey he could keep the balance of the account after their death.[119] Lowrey orally agreed and signed the signature card.

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[115] *Id.* at 782. The court cited *Pollard*, 210 Miss. at 834, 50 So. 2d at 547, and *Cochran*, 107 Miss. at 244, 65 So. at 214, as controlling. *Collier*, 285 So.2d at 781-82. A contingent fee contract does not vest in the attorney any interest in the subject matter of the litigation. A client may always settle or refuse to appeal a case without his attorney's permission. *Pollard*, 210 Miss. at 834, 50 So. 2d at 547; *Cochran*, 107 Miss. at 244, 65 So. at 214.

[116] *Collier*, 285 So. 2d at 782; *Pollard*, 210 Miss. at 834, 50 So. 2d at 548 (client may not contract away right to appeal); *Cochran*, 107 Miss. at 244, 65 So. at 215 (contract between attorney and client whereby client is forced to appeal is unenforceable).

[117] 543 So. 2d 1155, 1163 (Miss. 1989).

[118] *Lowrey*, 543 So. 2d at 1156. Lowrey, his wife Mary Ann and his six-month old son lived in a duplex in Oxford. *Id.* Two of Mrs. Smith's aunts lived on the other side of the duplex. *Id.* Lowrey met the Smiths during their frequent visits to see Mrs. Smith's aunts. *Id.*

A few months later Mr. Smith died from a suspicious gunshot wound. The circumstances suggested suicide and Mrs. Smith asked Lowrey to assist her in collecting Mr. Smith's $20,000 life insurance policy. Lowrey agreed but requested a fee separate from the prior agreement regarding the checking account.[120] Lowrey contended that he and Mrs. Smith thereupon orally agreed to a one-third contingent fee to be collected out the insurance proceeds.[121] Allstate agreed to honor the policy and the very next day Mrs. Smith died. Lowrey probated the will under which his wife was the named executrix.

At the time of Mrs. Smith's death, the checking account contained around $12,000. Lowrey went to the bank and had the account changed solely to his name. He paid some of the estate's expenses out of the account and then wrote himself two checks totaling $11,700.[122] Following the probating of Mrs. Smith's will, some of the residuary legatees complained about Lowrey's handling of the estate and his pocketing of all the remaining money in the checking account. Lowrey and Mary Ann thereafter petitioned the chancellor to allow them to withdraw as counsel and executrix respectively.[123] Lowrey then probated his claim for the contingent fee of $6,666. The new administrator filed a complaint to require Lowrey to give an accounting of the funds in the checking account.[124]

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[119] *Id.* Mr. Smith had Alzheimer's disease. *Id.* Mrs. Smith was concerned that both she and her husband might lose their mental faculties and wanted someone to take care of them. *Id.* Lowrey suggested to Mrs. Smith that a conservatorship be set up. *Id.* Mrs. Smith rejected this idea after Lowrey informed her that he might not be appointed the conservator. *Id.* Later, Mrs. Smith provided Lowrey with a signature card on the Smiths' joint checking account. *Id.* Lowrey alleged that Mrs. Smith told him he could keep whatever remained in the account after their deaths. *Id.* The purpose of the account was to provide Lowrey with funds to care for the Smiths upon their incapacitation. *Id.*

[120] *Id.* Lowrey agreed to represent the estate and had his wife appointed executrix. *Id.* He received a $300 retainer. *Id.* Lowrey believed the proceeds from Mr. Smith's life insurance policy were separate from the estate and felt that they would pass outside of the will. *Id.* As a result he allegedly asked Mrs. Smith for a separate fee agreement. *Id.*

[121] *Id.* at 1156-57. Lowrey alleged that on July 31, 1985 he and Mrs. Smith made an oral contingent fee contract under which Lowrey would receive one-third of any amount which Allstate might pay on the policy. *Id.*

[122] *Id.* at 1157. The account contained $12,012.05 at the time Lowrey assumed it. *Id.* Lowrey wrote five checks to cover medical and funeral bills on Mr. Smith. *Id.* He later made two separate withdrawals in the amounts of $7,000 and $4,700 which he deposited in his own account as compensation. *Id.* This left a balance of $2.05 in the account and it later went overdrawn when assessed service charges. *Id.* at 1157 n.1.

[123] *Id.* at 1157. The residuary legatees apparently felt Lowrey and his wife were not acting in the interest of the estate. *Id.*

The chancellor found that Lowrey had breached his fiduciary relationship with the Smiths by his keeping of the checking account. However, he allowed Lowrey to enforce the oral contingent fee contract.[125] Both parties appealed.[126] The Mississippi Supreme Court affirmed.[127]

The court began with an analysis of whether a contingent fee contract was reasonable in this case. The court found that because of the apparent suicide of Mr. Smith, recovery under the insurance policy was doubtful. Thus the use of a contingent fee contract was fair considering the gamble that Lowrey took on receiving any compensation.[128]

The court then turned to the most serious problem with the agreement. The court stated that Mississippi case law required an attorney attempting to claim under an oral contingent fee contract to show by clear and convincing evidence that there was full disclosure of all the terms of the agreement, that it was reasonable and fair, and was made in absolute good faith.[129] However, the court also had to address the impact of the clear language of Mississippi Rule 1.5(c). Rule 1.5(c) states:

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[124] *Id.* David Smith's brother-in-law, M.B. Spencer was appointed administrator d.b.n. *Id.* Apparently he also felt that Lowrey had taken advantage of the Smiths. Thus he filed a complaint to force Lowrey to give an accounting of the funds in the joint checking account. *Id.*

[125] *Id.* at 1158. The chancellor found that Lowrey had not committed any civil or criminal wrongdoing. *Id.* However, he found that he had breached his fiduciary relationship with the Smiths and failed to overcome the presumption of undue influence and ordered the return of the $11,700 from the checking account. *Id.* Notwithstanding this breach of duty, the chancellor awarded Lowrey his claim for $6,666 (one-third of the life insurance proceeds). *Id.*

[126] *Id.* at 1155.

[127] *Id.* at 1163. The Mississippi Supreme Court did not explain how Lowrey's breach of fiduciary duty did not constitute a civil wrong. *Id.* at 1162.

[128] *Id.* The court emphasized the uncertain nature of the claim under the life insurance policy. *Id.* Due to the suspicious circumstances surrounding David Smith's death it appeared the suicide exclusionary clause of his life insurance policy would bar the claim. *Id.* Taking into account the likelihood of nonrecovery, the court stated that a contingent fee contract was a fair method of compensation. *Id.*

[129] *Id.*; *see* Mercy Hospital, Inc. v. Johnson, 390 So. 2d 103, 103 (Fla. App. 1980) (attorney must show fairness of fee agreement by clear and convincing proof), *rev'd and remanded on other grounds*, 431 So. 2d 687, 688 (1983); *Fitzpatrick*, 187 Miss. at 850, 193 So. at 912 (contract for contingent fee must be in good faith and without undue influence of any kind); Kirby Hospital v. Liska, 334 N.W.2d 179, 183 (Neb. 1983) (attorney must show by clear and convincing evidence that all terms of contingent fee contract were disclosed and underlying fairness of transaction), *remittitur awarded*, 351 N.W.2d 421, 423 (1984); *cf.* Lutz v. Belli, 516 N.E.2d 95, 97 (Ind. App. 1987) (contingent fee agreement made after fiduciary relationship exists is presumptively invalid and burden

> A contingent fee agreement *shall* be in writing and *shall* state the method by which a fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of a settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[130]

After reciting the plain language of the rule, the Mississippi Supreme Court chose not to apply it and affirmed the lower court's enforcement of the oral contingent fee agreement.[131] The court said that although it would normally be inclined to enforce Rule 1.5, in this instance it would be "unduly harsh" to Lowrey.[132]

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of proof is on attorney to show fairness of transaction); Commission on Legal Ethics v. Galloher, 376 S.E.2d 346, 349 (W. Va. 1988) (burden of proof is on attorney to show fairness of transaction).

[130] MSRPC, *supra* note 42, Rule 1.5(c) (emphasis added); *cf.* Kirby, 334 N.W.2d at 182 (it is beneficial to parties to reduce contingent fee contract to writing).

[131] *Lowrey*, 543 So. 2d at 1163. The court cited four extenuating factors:

> 1. Lowrey was in Oxford and away from his office when Lois and he reached this agreement.
> 2. Lois was not only a client but a close personal friend, and he [Lowrey] undoubtedly did not expect her to die. It was Lowrey who ran the risk in not reducing the contract to writing. Following some substantial recovery, there can be a temptation to a client to deny the contract. It showed his confidence in Lois in not reducing the contract to writing and seeing she signed it.
> 3. Lowrey at the first opportunity informed the heirs of the insurance policy and his agreement with Lois.
> 4. While it is no doubt correct that at a flat, hourly rate, Lowrey did not put in $6,666 worth of time, he did have to put in time investigating David's death, securing and examining the death certificate, the police reports, conferring with representatives of Allstate, doing legal research, and otherwise pursuing this claim.

Id.

[132] *Id.* The court's holding implies that MSRPC, *supra* note 42, Rule 1.5(c)'s directive that contingent fee contracts be in writing is permissive in nature. The list of extenuating circumstances show that our court will not enforce the plain language of Rule 1.5(c) if it finds the contract to be intrinsically fair and the attorney satisfies the court by clear and convincing evidence that such an agreement truly existed. *Lowrey*, 543 So. 2d at 1163. This interpretation is in contradiction to both the spirit and the letter of the Rules. Rule 8.4 provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the rules of professional conduct. . . ." MSRPC, *supra* note 42, Rule 8.4. The preamble to the Mississippi rules provides: "Some of the Rules are *imperatives*, cast in the terms of '*shall*' or '*shall not*'." *Id.* at Scope (emphasis added). Rule 1.5 states:

V. CONTINGENT FEE CONTRACTS IN MISSISSIPPI POST-*Lowrey*

Mississippi law has been quite tolerant of contingent fee contracts. Since *Humphries*,[133] the Mississippi Supreme Court has consistently upheld such agreements with a minimum of constraints. The restrictions Mississippi law does recognize are in line with the majority of other jurisdictions. The law in this state is settled on many aspects of contingent fee agreements. However, *Lowrey*[134] leaves a large area uncertain.

With the adoption of the *Mississippi Rules of Professional Conduct* in 1987, it appeared Mississippi was substantially tightening the requirements for a valid contingent fee contract. This was a positive change. The requirement that all such contracts be in writing and detail the terms and conditions promotes ethical advocacy. Many litigants are unsophisticated and unfamiliar with the legal world. When an aggrieved plaintiff contracts away part of a valid recovery, the law should protect him from exploitation and misrepresentation. Forcing attorneys to commit the agreement to writing did away with most of these problems. It promoted full disclosure of terms and awareness of the client's liability to his attorney.

Oral contingent fee contracts present two distinct problems. First, is the obvious possibility of fraud. In the absence of a written agreement it is difficult to find the true intention of the parties. This is especially true in cases where the client has died such as in *Lowrey*.[135] Second, oral agreements present more opportunity for misunderstanding and uninformed decisions on the part of the client. Reducing an agreement to writing promotes consideration and explanation.

Lowrey[136] leaves us with unanswered questions. Although Mississippi Rule 1.5(c)[137] requires that contingent fee contracts be in writing, the Mississippi Supreme Court appears to have drafted an exception. If an attorney can show by clear and convincing evidence that there

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"A contingent fee agreement *shall* be in writing and *shall* state the method by which the fee is to be determined. . . ." *Id.* (emphasis added). *But cf. Rules of Discipline for the Mississippi State Bar* Rule 1 (1989) ("The Supreme Court of Mississippi (the Court) has exclusive and inherent jurisdiction of matters pertaining to attorney discipline. . . . The Court shall be the ultimate judge of matters arising under these rules, and from time to time the Court shall review these rules and amend them when necessary or desirable.") *Id.*

[133] *Humphries*, 87 Miss. at 536-37, 40 So. at 152.

[134] *Lowrey*, 543 So. 2d at 1163.

[135] *Id.*

[136] *Id.*

[137] *MSRPC*, *supra* note 42, Rule 1.5.

was full disclosure of the terms of the agreement, that it was fair and reasonable, and made in good faith, the court *may* enforce an oral contingent fee contract. This is where the uncertainty arises.[138] The *Lowrey* court said it would "ordinarily be inclined"[139] not to enforce an oral contingent fee contract notwithstanding the satisfaction of the above requirements. It justified its decision in *Lowrey* by claiming it would be "unduly harsh" to deny the attorney recovery.[140] This raises the question of what circumstances the court would consider as "unduly harsh."

Lowrey was an unfortunate decision. The requirement that all contingent fee contracts be in writing was a step forward for legal ethics in Mississippi. Our court has now chosen to ignore the clear language of the Rule 1.5 and draft judicial exceptions upon our *Mississippi Rules of Professional Conduct.*

Attorneys should recognize the mine field they enter when they form an oral contingent fee contract. Not only is it unclear whether our court would uphold the contract if litigated, but such oral contracts are fraught with problems for both the attorney and the client. Thus prudent attorneys will ensure that Mississippi Rule 1.5.[141] is followed meticulously and the client is fully informed in writing of the obligation and its terms. This not only protects the attorney, it promotes ethical advocacy.

E. Barney Robinson III

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[138] *Humphries*, 87 Miss. at 536-37, 40 So. at 152.

[139] *Lowrey*, 543 So. 2d at 1163.

[140] *Id.*

[141] MSRPC, *supra* note 42, Rule 1.5.

RECENT DECISION

ATTORNEY-CLIENT RELATIONSHIPS—UNDUE INFLUENCE—FIDUCIARY DUTY MANDATES THAT ATTORNEY ADVISE CLIENT TO SECURE INDEPENDENT ADVICE AND COUNSEL BEFORE ACCEPTING BENEFIT FROM CLIENT

Appellee[1] filed suit in the Chancery Court of Lafayette County, Mississippi, requesting a ruling[2] that appellant's[3] actions[4] constituted a breach of fiduciary duty.[5] The dispute arose due to appellant's acceptance of the balance of a joint checking account on which his name appeared as a cosignatory with the names of two clients.[6] The chancery court granted relief[7] upon finding that appellant had failed to overcome the presumption of undue influence.[8] On appeal, the Mississippi

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[1] M. B. Spencer, brother-in-law of David Smith, brought suit as administrator de bonis non of the estate of Lois Smith, widow of David Smith, on behalf of the residuary legatees. Lowrey v. Will of Smith, 543 So. 2d 1155, 1157 (Miss. 1989). The residuary legatees consisted of Lucille S. Spencer, Ruth Smith Smith, Russell W. Sublette, Mrs. Marguerite Sublette Bullard, Mrs. Frances Holmes Smith Hilburn, and Frank S. Smith. *Id.* at n.2.

[2] *Id.* at 1155-56. The chancery court ruled on two claims, the undue influence claim against the appellant and the appellant's contract claim against the estate of Lois Smith. *Id.* at 1155. Spencer requested an accounting of funds withdrawn by appellant, after the deaths of the Smiths, from a joint checking account held by cosignatories David and Lois Smith and appellant at a bank in Oxford, Mississippi. *Id.* at 1157. Appellant's counterclaim against the estate was founded on an oral contract with Lois for the successful recovery of an insurance claim for David's death. *Id.* Because David died from a self-inflicted gunshot wound, Lois, concerned that the suicide exclusion clause would preclude recovery under David's life insurance policy, requested appellant's assistance and agreed to a one-third contingency fee of whatever amount, if any, that the insurance company paid. *Id.* at 1156-57. The amount claimed by the appellant on the contract was $6,666.66. *Id.* at 1155.

[3] *Id.* Appellant was Danny L. Lowrey, attorney at law. *Id.* Lowrey not only served as counsel for the Smiths but he and his wife had also developed a long-standing friendship with them beginning during Lowrey's attendance at the University of Mississippi Law School in Oxford. *Id.* at 1156. The attorney-client relationship between Lowrey and the Smiths had become well established in the years prior to David's death. *Id.*

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[4] *Id.* at 1156-57. The claim against Lowrey originated from his agreement to sign a signature card in order to become a cosignatory, with the right of survivorship, on a joint checking account with the Smiths and from his withdrawals from that account subsequent to the deaths of the Smiths. *Id.* at 1156. Because of the personal and professional relationship that had developed with Lowrey, Lois asked that he see to it that David and she were taken care of should they become unable to provide for themselves. *Id.*

When Lois died approximately four months after David's death, Lowrey made himself the sole signatory of the account containing $12,012.05, wrote five checks to cover Lois' medical and funeral expenses, and then made two withdrawals from the account in amounts of $7,000 and $4,000 respectively, transferring the funds to his bank account in Alcorn County, Mississippi. *Id.* at 1157. The Oxford account was left with a balance of $2.05 and eventually went overdrawn due to service fee charges. *Id.* at n.1.

[5] *Id.* at 1159. Spencer alleged that Lowrey had used his position as legal counsel to exercise undue influence over the Smiths to attain the position of cosignatory on their checking account. *Id.* at 1155.

[6] *Lowrey*, 543 So. 2d at 1157. Though Lowrey did not sign the signature card until the year when both his clients died, the relationship between the Smiths and Lowrey began nearly ten years earlier. *Id.* at 1156. The friendship developed through visits with Lowrey's next door neighbors, who were also Lois' aunts. *Id.*

[7] *Id.* at 1155. The chancellor granted relief on both the undue influence claim against Lowrey and Lowrey's contract claim against the estate. *Id.* On the counterclaim, the chancellor reasoned that although Lowrey had failed to comply with Rule 1.5(c) of the Rules of Professional Conduct by not reducing the contingency fee contract with Lois to writing, the close personal friendship between the parties alleviated the normal concern that the client would ultimately deny the agreement. *Id.* at 1162.

[8] *Id.* at 1155. After pointing out that Lowrey had not committed any intentionally wrongful civil or criminal act against the Smiths but instead had "simply acted unwisely," the chancellor held that Lowrey was nevertheless subject to the presumption of undue influence since Spencer had shown the existence of a fiduciary relationship between the Smiths and Lowrey in which Lowrey was the dominant party. *Id.* at 1160-61. The court stated that Lowrey could overcome the presumption by satisfying the "three-pronged burden" with clear and convincing proof that (1) he acted in good faith; (2) the Smiths had full knowledge and deliberation of their actions and the related consequences; and (3) they had obtained competent, independent advice from a person disconnected from Lowrey and wholly concerned with the best interests of the Smiths. *Id.* at 1161. In the chancellor's opinion, Lowrey failed to overcome the presumption because he had not satisfied the third prong requirement. *Id.*

Noting the possibility of a different outcome had Lowrey not been a lawyer, the court stressed that the attorney-client relationship is one which requires that the attorney exercise the "highest standard of good faith and fidelity" and that the integrity of the legal profession calls for strict scrutiny. *Id.* Thus, Lowrey was ordered to return the funds he had withdrawn. *Id.* at 1155.

Supreme Court, *held*, affirmed.[9] Where a presumption of undue influence is raised against an attorney for accepting a benefit from his client, the attorney, in order to overcome the presumption, must prove by clear and convincing evidence that he advised his client to secure independent advice and counsel before granting the benefit upon the attorney. *Lowrey v. Will of Smith*, 543 So. 2d 1155 (Miss. 1989).

Mississippi courts' concern and consequential need to protect subservient persons in fiduciary relationships began over a century ago with the case of *Meek v. Perry*.[10] In *Meek*,[11] a ward suffering from pulmonary disease and expecting to die in the near future devised[12] the bulk of her estate to her guardian[13] to the exclusion of her sister.[14] After a comprehensive review of English and American law on the issue,[15] the High Court of Errors and Appeals proclaimed that public policy calls for vigorous analysis of a fiduciary's actions since alternative judicial treatment would effectively benefit fraudulent and egocentric deeds.[16] The High Court of Errors and Appeals upheld the decree that undue influence[17] by the guardian was presumed.[18] Accordingly, the court placed the burden on the guardian to prove "full deliberation" on the part of the ward before drafting the will and "abundant good faith" by the guardian during his relationship with the decedent.[19]

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[9] *Id.* at 1156. On Lowrey's direct appeal, the court addressed two issues, the defense of improper venue and the chancellor's holding that Lowrey had not overcome the presumption of undue influence. *Id.* at 1155. On the cross appeal, the court considered the judgment against the estate for the contingency fee. *Id.* On the improper venue issue, the court reasoned that Lowrey's failure to make a timely motion to transfer the action to the proper court constituted a waiver of defective venue under Rule 12(h)(1) of the Mississippi Rules of Civil Procedure. *Id.* at 1159. The court found that a fiduciary relationship existed and extensively quoted the chancellor's findings on the undue influence issue. *Id.* at 1160-62. Similarly, the court concluded that the chancellor's ruling enforcing Lowrey's contract with Lois was not erroneous since Lowrey had proven that the contract had been made in good faith and that its terms were fair, reasonable and fully disclosed. *Id.* at 1163.

[10] 36 Miss. 190 (1858).

[11] *Meek*. 36 Miss. at 243. The proponents of the will appealed from a decree by the Court of Probate of Panola County declaring that the will drafted in the guardian's favor was due to a lack of full deliberation by the ward and abundant good faith by the guardian. *Id.* at 244. The proponents alleged that the jury instructions, calling for a finding against the will if the full deliberation and abundant good faith factors were absent at the time the will was drafted, were erroneous. *Id.*

[12] *Id.* The ward-testatrix, eighteen, drafted her will at such an early age because of her anticipation of death from her illness. *Id.* at 243.

[13] *Id.* The guardian was her deceased father's brother. *Id.* Though the mother of the ward remarried and the ward and her sister consequently lived in the home of the stepfather until the mother's death, the guardianship commenced in the year of the mother's remarriage. *Id.* at 192.

[14] *Id.* The ward bequeathed her servants to the children of both her sister and her uncle-guardian, with the remainder of her estate (all of her real and personal property) going to the guardian. *Id.*

[15] *Id.* at 245-58. The court analyzed numerous decisions under both American and English jurisprudence, which dealt with why a presumption arises when the dominant party in a confidential or fiduciary relationship attains a benefit, whether by gift, will, deed, or contract, from the party reposing trust in him. *Id. See generally* deFuria, *Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to*

Although the reasons for judicial scrutiny in cases where a fiduciary relationship yields a benefit to the dominant party had already been entrenched in Mississippi common law, the need arose in *Ham v.*

Ethical Prohibition, 66 NEB. L. REV. 695, 699 n.25 (1987) (inter vivos transactions are viewed with more exacting analysis since living persons are in greater need of judicial protection than deceased persons); Annotation, *Undue Influence in Nontestamentary Gift from Client to Attorney*, 24 A.L.R.2d 1288, 1298-1300 (1952) (jurisdictional differences in effect of lack of independent advice).

[16] *Meek*, 36 Miss. at 245-46. The court reasoned that because of the confidential relations of guardian and ward, attorney and client, principal and agent, physician and patient, trustee and *cestui que trust*, and similar associations, "the law, upon grounds of great public policy, utility, or necessity, *presumes* the existence of 'undue influence'. . . ." *Id.* at 245 (emphasis in original); *see also* Thomas v. Whitney, 186 Ill. 225, 57 N.E. 808, 810 (1900) (discussion of presumption of undue influence in fiduciary relationships); Norris v. Norris, 498 So. 2d 809, 813-14 (Miss. 1986) (notwithstanding presumption's potential for harsh results, protection of subservient person demanded legal rule); Nicholson v. Shockey, 192 Va. 270, 64 S.E.2d 813, 817 (1951) (court recognized that presumption arises in any type of fiduciary relationship). *But cf.* Costello v. Hall, 506 So. 2d 293, 297 (Miss. 1987) (power of attorney alone not sufficient to raise presumption). *See generally* Johnston, *An Ethical Analysis of Common Estate Planning Pratices-Is Good Business Bad Ethics?*, 45 OHIO ST. L.J. 57, 60-86 (1984) (attorney as draftsman and beneficiary of will as cause for disciplinary action); Kaufman, Book Review, 94 HARV. L. REV. 1244, 1291-92 (1981) (reviewing conflicts of interests arising from attorneys' personal relationships).

[17] *Meek*, 36 Miss. at 258-59. Undue influence has been defined as the "[m]isuse of position of confidence or taking advantage of a person's weakness, infirmity, or distress to change that person's actions or decisions." BLACK'S LAW DICTIONARY 795 (5th ed. 1983).

[18] *Meek*, 36 Miss. at 258-59. The court held the jury instructions to be correct in their requirements. *Id.* The instructions set forth the policy that the law jealously guard the rights of a ward by requiring the guardian to show the circumstances surrounding the transaction to be free of suspicion. *Id.*

[19] *Id.* The court noted that the difference between the American and English cases was the American limitation on the legal presumption of undue influence. *Id.* at 250. Where the English law treated the presumption as final upon sufficient proof by the plaintiff of the existence of a fiduciary relationship, American jurisprudence raised a prima facie presumption allowing the defendant to rebut the plaintiff's proof. *Id.*

Ham[20] for the Mississippi Supreme Court to state more clearly the test by which persons allegedly violating fiduciary duties[21] could be judged. *Ham* involved two brothers engaged in a partnership mercantile business who made an agreement whereby the senior brother conveyed virtually all of his property to his younger brother in exchange for the younger brother's payment of a monthly allowance for the remainder of the elder's life, together with any potential medical and ultimate funeral expenses.[22] The court set aside the deed conveyed by the decedent to his brother since the beneficiary had failed to meet his burden of proof that the conveyance had not been the result of his influence in the close familial and business relationship.[23] The court in *Ham* listed three indicia that would evince that the dominant party had not abused his position by exercising undue influence over the trusting party.[24] The court proclaimed that proof of the following elements would overcome the presumption of undue influence: (1) good faith on the part of the influential party; (2) full knowledge by the subservient party of his actions; and (3) independent consent and action by the subservient party in granting the benefit.[25]

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[20] 146 Miss. 161, 110 So. 583 (1926).

[21] *Ham*, 146 Miss. at 173, 110 So. at 584. The court summarized the situations in which the presumption arises as being "every possible case in which a fiduciary relation exists as a fact, in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and duties involved in it need not be legal, it may be moral, social, domestic, or merely personal." *Id.* (quoting 2 POMEROY EQUITY JURISPRUDENCE § 956 (1918)).

[22] *Ham*, 146 Miss. at 170, 110 So. at 583. The elder brother was a bachelor who had previously executed a will by which he devised all of his property to his siblings. *Id.* The siblings and the heirs of a deceased sister brought the suit on the basis that their rights under the will were infringed upon by the younger brother's attainment of the deed. *Id.*

[23] *Id.* at 174, 110 So. at 585. The court reversed the chancery court's dismissal of the complaint even though the record was barren of any evidence of pressure exerted by the beneficiary upon the grantor. *Id.* at 171-72, 110 So. at 584; *cf.* Neil v. Brackett, 234 Mass. 367, 126 N.E. 93, 94 (1920) (undetectability of undue influence as reason for presumption); Estate of McRae, 522 So. 2d 731, 737 (Miss. 1988) (presumption served to nullify "closet advantage" taken by dominant party); Jamison v. Jamison, 96 Miss. 288, 298, 51 So. 130, 131 (1910) (court recognized that persons exerting undue influence do so in private).

[24] *Ham*, 146 Miss. at 173, 110 So. at 584. The court's position was that the presumption of invalidity could only be overcome when the party claiming the benefit offered sufficient proof to the court of these factors. *Id.*, 110 So. at 584-85; *see* Peyton v. William C. Peyton Corp., 23 Del. Ch. 321, 7 A.2d 737, 747 (1939) (superior party required to show compliance with "all equitable requisites"); Wofford v. Wofford, 244 Miss. 442, 460-61, 142 So. 2d 188, 195-96 (1962) (dominant party failed to repel presumption); Olmstead v. Olmstead, 233 Miss. 621, 628, 103 So. 2d 399, 402 (1958) (prima facie case immediately placed dominant party "behind 'the eight ball' legally"); Hickey v. Anderson, 210 Miss. 455, 462-63, 49 So. 2d 713, 716-17 (1951) (where prima facie case of undue influence was established, court required proponents to rebut); Bourn v. Bourn, 163 Miss. 71, 79, 140 So. 518, 520-21 (1932) (insufficient evidence to overcome presumption).

While the specific context of attorney-client relationships had been determined by the court to be within the ambit of judicial scrutiny regarding fiduciary relationships,[26] the case of *Gwin v. Fountain*[27] was the first time the Mississippi Supreme Court directly addressed the issue of a presumptively invalid transaction between an attorney and his client.[28] The attorney obtained a decree granting him a $25,000 fee for legal services rendered during his client's administration of an estate.[29] Based upon the attorney's advice, no one represented the estate at the hearing where the attorney's fee was ratified.[30] Though *Gwin*'s significance is subtle, the court alluded to a more stringent standard of scrutiny for transactions where an attorney, as the dominant party, has secured an advantage over his client.[31] The court proclaimed that it was not only its duty to make sure that clients were not taken advantage of by their attorneys but the court would also, in its discretion, hold transactions occurring during the attorney-client relationship void where the same transaction between other persons would be declared valid.[32] Using the same reasoning, the *Gwin* court held that in situations where an attorney should realize that his personal interests have come to conflict with his client's interests, the attorney, as the trusted party, has a duty to inform the client of the conflict of interest,[33] thereby giving the client the option to secure another attorney to represent him in the matter.[34]

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[25] *Ham*, 146 Miss. at 173, 110 So. at 584 (quoting 2 POMEROY, EQUITY JURISPRUDENCE (4th ed. § 957 (1918)). The court noted that the most successful manner in which independent consent and action could be proven was for the dominant party to show that the grantor of the benefit "acted on the advice of a competent person, disconnected from the grantee and devoted wholly to the grantor's interest." *Id.* at 174, 110 So. at 585.

[26] Hitt v. Terry, 92 Miss. 671, 710-11, 46 So. 829, 839-40 (1908) (benefit gained by fiduciary was prima facie void requiring proof of absence of undue influence); *cf.* Spiva v. Boyd, 206 Ala. 536, 90 So. 289, 290 (1921) (attorney-client relationship listed as relationship jealously scrutinized by courts of equity).

[27] 159 Miss. 619, 126 So. 18 (1930).

[28] *Gwin*, 159 Miss. at 645, 126 So. at 22. The attorney had obtained a $25,000 fee from an estate which he had been attorney, legal advisor, and friend to the legatees, devisees, and the original and successor executors of the will. *Id.* at 644, 126 So. at 22.

[29] *Id.* at 637, 126 So. at 19. The executors of the original executor of the estate filed a report on the original executor's administration of that estate and noted that the attorney had rendered valuable services aiding his client's administration which were deserving of reasonable compensation. *Id.* at 646, 126 So. at 22.

[30] *Id.* at 646-47, 126 So. at 22-23. After the report and petition were filed, the successor executor, the devisees, and the legatees were summoned to appear and show cause for the denial of payment. *Id.* at 646, 126 So. at 22. The successor executor elected not to appear after questioning the attorney as to the necessity of such appearance and being led to believe that his appearance was not essential. *Id.* at 646-47, 126 So. at 22-23.

[31] *Id.* at 645-46, 126 So. at 22. The court emphasized the nature of the attorney's position in the relationship as one demanding rigorous judicial criteria. *Id.*; *see also* G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 55 (5th ed. 1884) (timeless statement of temptations that lawyers face to violate ethical duties).

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[32] *Gwin*, 159 Miss. at 645, 126 So. at 22. The court found that the attorney-client relationship was one of such character as to render the attorney's fee fraudulent in law, notwithstanding a lack of proof of intentional moral wrong committed by the lawyer. *Id.* at 647, 126 So. at 23; *see also* Trafton v. Youngblood, 69 Cal. 2d 17, 69 Cal. Rptr. 568, 575, 442 P.2d 648, 655 (1968) (attorney held to standard requiring more than simply refraining from exercising undue influence). *See generally* Note, *Attorney Beware-The Presumption of Undue Influence and the Attorney-Beneficiary*, 47 NOTRE DAME LAW. 330, 330-40 (1971) (authored by Harry S. Raleigh, Jr.) (review of jurisdictional positions on undue influence presumption where attorney-draftsman is beneficiary under will); Annotation, *Presumption or Inference of Undue Influence from Testamentary Gift to Relative, Friend, or Associate of Person Preparing Will or Procuring Its Execution*, 13 A.L.R.3d 381, 381-97 (1967) (cases where draftsman used undue influence for benefit of another).

[33] *Gwin*, 159 Miss. at 647-48, 126 So. at 23. Nothing short of actual notice to the client of the potential jeopardy to his interests was an acceptable handling of the situation. *Id.* at 648, 126 So. at 23; *accord* G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 110 (5th ed. 1884) (client may presume complete fidelity to his interests where attorney fails to disclose contrary position); *see* Ball v. Posey, 176 Cal. App. 3d 1209, 1214, 222 Cal. Rptr. 746, 749 (1986) (attorney failed to advise client to obtain separate counsel before becoming cosignatory on bank account); Toomey v. Moore, 213 Or. 422, 325 P.2d 805, 810 (1958) (grantor's attorney-friend violated fiduciary duty by not insisting upon procurement of independent advice); *see also* State Bar Ass'n of Conn. v. Connecticut Bank & Trust Co., 145 Conn. 222, 140 A.2d 863, 870 (1958) (court recognized that attorneys' position demands "utter renunciation" of any personal interests conflicting directly or indirectly with clients' interests); *cf. In re* Will of Tank, 132 Misc. 2d 146, 503 N.Y.S.2d 495, 498 (N.Y. Sur. Ct. 1986) (attorney-draftsman had ethical duty to discourage and refuse bequest solely founded upon business relationship). *See generally Matthew* 6:24 ("No man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other . . ."); Annotation, *Independent Advice as Essential to Validity of Transaction Between Persons Occupying a Confidential or Fiduciary Relationship*, 123 A.L.R. 1505, 1505-20 (1939) (comparison of differences in treatment among jurisdictions).

[34] *Gwin*, 159 Miss. at 648, 126 So. at 123. The court chose language of volition in its suggested notice by the attorney regarding the client's ultimate choice of whether or not to employ different counsel, allowing the inference that the attorney would have satisfied his duty upon advising outside counsel even if the client elected to continue using his services. *Id.*; *see also* Schwab, *The Lawyer as Beneficiary*, 45 TEX. B.J. 1422, 1425 (1982) (although lawyer should refuse alltogether, where client is insistent upon attorney drafting will in which he is beneficiary, lawyer should advise client to seek independent counsel). *But cf.* deFuria, *A Matter of Ethics Ignored: The Attorney-Draftsman as Testamentary Fiduciary*, 36 U. KAN. L. REV. 275, 309 (1988) (lawyers should be absolutely precluded from drafting will under which they are fiduciary such as executor); deFuria,

The Mississippi Supreme Court examined the attorney-client relationship again in the case of *In re Will of Moses*.[35] In *Moses*, a client devised the bulk of her $125,000 estate to her attorney.[36] Even though the client had employed the services of an impartial lawyer to draft her will, the beneficiaries under an earlier will claimed that the attorney-beneficiary had exercised undue influence to obtain most of his former client's estate.[37] Historically, the court required either the beneficiary's active participation in the preparation or execution of the will or some other suspicious circumstance to raise a presumption of undue influence.[38] However, the court in *Moses* set aside the will and stated that the attorney, who may not have even been aware the will existed,[39] had exercised influence over his client for his personal benefit.[40] Since the

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Testamentary Gifts from Client to the Attorney-Draftsman: From Probate Presumption to Ethical Prohibition, 66 NEB. L. REV. 695, 724-25 (1987) (lawyer's responsibility to client outweighs inconvenience to client in consulting outside attorney); Note, *Attorney Beware-The Presumption of Undue Influence and the Attorney-Beneficiary*, 47 NOTRE DAME LAW. 330, 339 (1971) (attorney who drafts will making him beneficiary does disservice to his client, legal profession, and himself).

[35] 227 So. 2d 829 (Miss. 1969).

[36] *Moses*, 227 So. 2d at 831. The record included circumstantial evidence to the effect that the attorney-client relationship was augmented by a sexual relationship. *Id.* at 833. The dissent charged the majority with moral judgment of the relationship as opposed to applying the rules of law. *Id.* at 843 (Robertson, J., dissenting). However, the majority reasoned that the intimate relationship was relevant, under the circumstances, to its inference of undue influence. *Id.* at 836. *Contra In re* Estate of Peterson, 283 Minn. 446, 168 N.W.2d 502, 504-05 n.2 (1969) (attorney was not unnatural object of testator's bounty, thus drafting will did not raise grave problems of professional responsibility).

[37] *Moses*. 227 So. 2d at 833. The court agreed but the decison was split and the opinion was accompanied by a powerful dissent charging the majority with throwing "all the time honored tests out the window." *Id.* at 838-43. (Robertson, J., dissenting).

[38] *In re* Will of Adams, 529 So. 2d 611, 615 (Miss. 1988) (no presumption arises without proof of abuse of trust by dominant party); *accord In re* Estate of Bilello, 317 So. 2d 916, 918 (Miss. 1975) (evidence of suspicious circumstances coupled with confidential relation warranted application of doctrine of presumptive invalidity); Croft v. Alder, 237 Miss. 713, 723-24, 115 So. 2d 683, 686 (1959) (will set aside for failure to overcome presumption); *see also* Disciplinary Bd. v. Amundson, 297 N.W.2d 433, 439 (N.D. 1980) (court pointed out that suspicious circumstances surrounding drafting of wills lead public to question integrity of attorneys); *cf.* Committee on Professional Ethics v. Randall, 285 N.W.2d 161, 165 (Iowa 1979) (drafting client's will in one's own favor deemed professionally unacceptable regardless of proof of undue influence—license revoked), *cert. denied*, 496 U.S. 946 (1980).

[39] *Moses*, 227 So. 2d at 843 (Robertson, J., dissenting). No evidence was presented to show that the attorney-beneficiary was knowledgeable of his client's will nor that he had participated in any form or fashion in the preparation or execution of it. *Id.*

[40] *Id.* at 835-36. The court assumed that the attorney was aware of the law on the issue and thus purposely did not personally participate in preparing or executing the

drafting lawyer had failed to inquire into the circumstances which justified the testatrix's preference of her attorney over her blood relatives in her will,[41] the court determined that the drafting attorney was unable to give adequate advice.[42] The court held that consultation with an impartial lawyer, who knows nothing of the antecedent circumstances leading up to the transaction upon which the legal advice is sought, fails to constitute independent advice and counsel.[43]

Finally, after years of seemingly inconsistent decisions, the Mississippi Supreme Court took the opportunity in *Murray v. Laird*[44] to pose a proper analysis of a presumptively invalid transaction.[45] Six siblings brought suit against a brother who had allegedly exerted undue influence over the father to obtain a future interest in an eighty acre tract

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will. *Id.* at 835.

[41] *Id.* at 833-34. The outside counsel had simply drafted the will according to the testatrix's wishes and thus served as "little more than . . . [a] scrivener." *Id.* at 834; *see also* People v. Berge, 620 P.2d 23, 24-25 (Colo. 1980) (ninety-day suspension from practice for referral to drafting attorney who performed service as favor); *In re* Estate of Zurkow, 74 Misc. 2d 736, 345 N.Y.S.2d 436, 440 (N.Y. Sur. Ct. 1973) (where drafting attorney was member of same firm as attorney-beneficiary, explanation was required). *See generally* Aronson, *Conflict of Interest Problems of the Private Practitioner*, in PROFESSIONAL RESPONSIBILITY, A GUIDE FOR ATTORNEYS 91, 98-99 (1978) (independent drafter must be more than "mere 'scrivener' ").

[42] *Moses*, 227 So. 2d at 834-36. The court emphasized the unsoundness of holding that a testator had received independent advice and counsel when the will is prepared by an attorney who is unaware of antecedent circumstances. *Id.* at 836; *see* McDowell v. Pennington, 394 So. 2d 323, 324-25 (Miss. 1981) (attorney simply drafting will according to information supplied him held to be insufficient counsel); *cf.* Thomas v. Jolly, 251 Miss. 448, 456, 170 So. 2d 16, 20 (1964) (proclamation in front of notary public that deed was executed of free will held insufficient to show independent consent and action).

[43] *Moses*, 227 So. 2d at 836. The court declined to accept the premise that the presumption of undue influence could be overcome by the simple act of employing the legal services of another attorney who was ignorant of the true state of mind of his transient client. *Id.*

[44] 446 So. 2d 575 (Miss. 1984).

[45] *Murray*, 446 So. 2d at 578-79. The court in *Murray* offered factors for each prong of the burden that would be considered when a beneficiary was put in the position to overcome the presumption of undue influence. *Id.* However, the court qualified its offering by pointing out that all factors would not fit all situations since each case ultimately was determined on its specific facts. *Id.* at 578. The court summarized the three-pronged burden as (1) the grantee/beneficiary's exercise of good faith; (2) the grantor's complete knowledge and deliberation of his actions and the associated consequences of those actions; and (3) the grantor's attainment of advice from an independent, competent person concerned only with the grantor/testator's interests. *Id.*; *e.g.*, Harris v. Sellers, 446 So. 2d 1012, 1014-15 (Miss. 1984) (nephew, who was also pastor of church, was required to rebut by *Murray* standards); *see also* Hendricks v. James, 421 So. 2d 1031, 1042-45 (Miss. 1982) (historical development of presumption theory).

of land.[46] After finding that a confidential relationship existed where the grantee-son served as the business representative of his eighty-nine year old illiterate, sickly father, the court set aside the conveyance from the father to his son for insufficient proof of independent advice.[47] In a lengthy discussion, the court promulgated several factors that would be used as guidelines in the determination of whether the presumption of undue influence had been overcome.[48]

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[46] *Murray*, 446 So. 2d at 576. The son signed his father out of a nursing home and took him to an attorney's office where the deed was executed. *Id.* at 577. The record included testimony that the father had declared his wishes to be an equal division among his children of the land upon his death. *Id.*

[47] *Id.* at 580. The attorney testified that he was unsure as to which person was his client, the father or the son. *Id.* Nevertheless, the record showed that the son contacted the attorney prior to the father's appointment. *Id.* at 577.

[48] *Id.* at 578-79. The court declared the following guidelines determining whether the presumption of undue influence was overcome:

> (1) Important factors on the question of good faith are, (a) the determination of the identity of the initiating party in seeking preparation of the instrument, (b) the place of execution of the instrument and in whose presence, (c) what consideration and fee were paid, if any, and (d) by whom paid, and (e) the secrecy or openness given the execution of an instrument. . . . (2) Factors important to address the grantor/testator's knowledge, at the time of execution of any instrument are (a) his awareness of his total assets and their general value, (b) an understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution, (c) whether non-relative beneficiaries would be excluded or included and, (d) knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent . . . the grantor/testator [is] on him and how susceptible [he is] to his influence. . . . (3) [Important factors of the last prong, that of] . . . advice of a competent person . . . disconnected from the grantee, and . . . devoted wholly to the grantor/testator's interest, [are] . . . [(a)] [t]he advisor has to have conferred with the grantor/testator prior to the document drafting . . . [(b)] [the] "independent" advice . . . [must be] advice separate and apart from the beneficiary, both in the initiation and execution of the instrument . . . [and] [(c)] [the] advisor must have . . . knowledge upon which to base advice.

Id. at 578-79. The *Murray* court also stated that in order for the advisor to learn of any antecedent agencies, he would have to meet certain minimum requirements in his consultation with the grantor/testator. *Id.* at 579. The court's list of what the advisor must become apprised with included:

> [(1)] the relationship of the grantor/testator to any beneficiary/grantee and the purpose or reason of an unequal division or distribution to donees/heirs of the same class, . . . [(2)] the relationship of the non-blood donee and the duration of that relationship[,] . . . [(3)] the relationship, or lack of relationship, to kinsmen, . . . [(4)] tax consequences[,] . . . [(5)] information as to the marital background, age, physical and mental health of [the] grantor/testator[,] . . . [(6)]

In *Mullins v. Ratcliff*,[49] the supreme court again ruled upon a dispute among siblings over an intrafamily transfer of property.[50] Two sisters alleged that a younger sister had taken advantage of her position as guardian over the women's physically handicapped brother to obtain one hundred acres of family land.[51] Unlike the *Murray* outcome, the court concluded that the sister had overcome the presumption of undue influence, imposed due to her guardianship, and allowed the conveyance to stand.[52] The court acknowledged the difficulty in and sometimes unjust results of requiring the beneficiary to prove that prior to accepting the benefit, the grantor had received advice from a competent person, disconnected from the beneficiary and wholly devoted to his own interests.[53] Therefore, the court held that "the independent advice prong of *Murray* ha[d] been read too strictly" and redefined the third prong of the test to be that of proof by the beneficiary that the grantor/testator exhibited independent consent and action in granting

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> whether the disposition is the free and voluntary act of an independent thinking, strong willed individual or whether the decision is imposed by the dominance of an over-reaching person. . . .

Id. The court proclaimed these factors to be a necessary adjunct to the third prong requirement. *Id.*

[49] 515 So. 2d 1183 (Miss. 1987).

[50] *Mullins*, 515 So. 2d at 1185. The court stated that the appeal was on the "all too familiar story of family members charging siblings with use of undue influence to obtain a larger than fair share of the family property." *Id.* Familiarity aside, the court added that the decision would ultimately turn on the facts involved in the particular dispute at bar. *Id.*

[51] *Id.* at 1185-86. The ward was the eldest of eight children. *Id.* at 1186. The ward's physical handicap was Hydrocephaly, a condition manifested by an enlarged cranium. *Id.* Several persons testified on the ward's mental competence; but the court concluded that the ward was mentally competent at the time of the conveyance. *Id.* at 1187-91.

[52] *Id.* at 1196. The court reached the conclusion that the sister had rebutted the presumption, that arose due to her position over her brother, after a lengthy application of the *Murray* factors to the specific facts of the case. *Id.* at 1191-96. By viewing the circumstances as a whole and not weighing any one *Murray* factor more than the others, the court decided that the chancellor could rationally conclude that the ward acted without the influence of his guardian-sister. *Id.* at 1196; *see* Kelly v. Shoemake, 460 So. 2d 811, 820-21 (Miss. 1984) (application of *Murray* factors); *cf. In re* Estate of Vick, 557 So. 2d 760, 770 (Miss. 1989) (court held that factual disputes result in trier of fact determining whether presumption has arisen and has been dissipated).

[53] *Mullins*, 515 So. 2d at 1193. The court stated that the heavy burden of the *Murray* third prong requirement necessitated change. *Id.* Specifically, the court reasoned that its purpose in modifying the test used to overcome the presumption of undue influence was to make certain that "bona fide intervivos gifts not be practically thwarted by often impossible evidentiary encumbrances." *Id.* Additionally, the court noted that the apparent inconsistency in past decisions on the undue influence issue was caused by differing conclusions drawn from the illustrative language in *Ham. Id.* at 1193-94.

the benefit.[54]

In the instant case, the Mississippi Supreme Court reasoned[55] that since the public opinion of lawyers' character already lacks respect,[56] the standard by which a lawyer's actions are to be judged is that of "the highest standard of good faith and fidelity."[57] Because an attorney-client relationship is one of a fiduciary nature,[58] the court presumed an exercise of undue influence by the attorney over the client in obtaining the cosignatory position on his clients' checking account.[59] The court, by designating the attorney as the dominant party[60] in a confidential relationship, shifted the burden of proof upon the attorney to satisfy the "three-pronged burden."[61] However, the court noted that the client's interests should be afforded zealous judicial protection and accordingly clad the third prong of the attorney's burden with an additional requirement—that the attorney had given actual advice to the client to secure counseling from someone unconnected to the attorney and his interests.[62] Hence, the Mississippi Supreme Court ruled that since Lowrey had acted "unwisely" in not advising the Smiths to obtain independent counseling before activating their wishes,[63] he could not overcome the presumption of undue influence raised against him.[64]

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[54] *Id.* at 1193. The court added that a review of Mississippi common law coupled with common sense led it to the conclusion that it is "[b]etter that the scope of equitable principles be imperfectly defined than that justice be overborne by the weight of artificial rules." *Id.* at 1194. The fact that the court had not consistently demanded "independent advice" as opposed to "independent consent and action" was readily apparent from the court's summary of Mississippi law relative to the burden of proof placed upon persons who have presumptively used undue influence. *Id.* at 1193-94. The *Murray* factors under the advisor's role were incorporated into the modified test for those cases in which the parties chose to prove independent consent and action through a showing of independent advice. *Id.* at 1194; *e.g., In re* Estate of Haney, 516 So. 2d 1359, 1361 (Miss. 1987) (*Mullins* test met); Blissard v. White, 515 So. 2d 1196, 1200 (Miss. 1987) (court recognized that case was controlled by *Mullins*); *accord* Angle v. Estate of Angle, 519 So. 2d 883, 885 (Miss. 1988) (court interpreted *Mullins* change to mean that though independent advice was no longer part of test, it would still serve as manner to prove current requirement); *see In re* Estate of Harris, 539 So. 2d 1040, 1042-43 (Miss. 1989) (example of detached legal counsel as sufficient); *see also* Miner v. Bertasi, 530 So. 2d 168, 171-72 (Miss. 1988) (application of *Mullins* test and *Murray* guidelines).

[55] Lowrey v. Will of Smith, 543 So. 2d 1155, 1160-62 (Miss. 1989). The court adopted and quoted at length the chancellor's reasoning on the undue influence issue. *Id.*

[56] *Id.* at 1162. "[T]he general public rates the morals and character of lawyers just below that of used car salesmen." *Id.*

[57] *Id.* at 1161. In its analysis, the court stressed that the attorney-client relationship is "very, very highly fiduciary in nature. . . ." *Id.*

[58] *Id.* While stating that a fiduciary relationship may exist outside of professional relations, the court expressed special concern over the fact that Lowrey was an attorney. *Id.*

[59] *Id.* Once the court determined that a confidential relationship existed, the burden of proof shifted to Lowrey to overcome the presumption of undue influence. *Id.*

[60] *Lowrey*, 543 So. 2d at 1161. The court defined a dominant or superior party in a fiduciary relationship to be one who exerts influence over and is aware of the confidence and trust placed in him by the subservient or inferior party. *Id.*

[61] *Id.* Without citing authority, the court noted that if Lowrey had been able to prove by clear and convincing evidence that one, he had acted in good faith when he agreed to be a cosignatory with the Smiths; two, the Smiths had full knowledge of and had fully deliberated their making Lowrey a cosignatory and all of the associated consequences of such action; and three, the Smiths had received competent, independent ad-

Understandably, the supreme court of this state is concerned with protecting dependent persons from abusive and self-serving fiduciaries.[65] However, it is clear that the attorney in *Lowrey* was required to meet a burden of proof that had only recently been declared inappropriate due to the third prong's potential for unjust results.[66] In order to preserve the integrity of the legal profession, the attorney-client relationship should be meticulously analyzed by courts when it appears that a lawyer has violated his fiduciary duty to the client;[67] but the burden of proof for all beneficiaries, no matter the type of fiduciary relationship involved, has remained a unifying factor.[68] By articulating the widely recognized rule that an attorney in a possible beneficiary position must advise his client to obtain independent advice and counsel before granting the benefit, the Mississippi Supreme Court simply brought Mississippi in line with the many other jurisdictions which concede the rule's sound reasoning.[69] Nevertheless, the court, by stat-

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vice from someone detached from Lowrey and devoted to the Smiths, then the presumption of undue influence would have been overcome. *Id.*

[62] *Id.* While stating that the satisfaction of the "three-pronged burden" would overcome the presumption against Lowrey, the court added that simply proving that the Smiths had received independent advice was not enough; rather, Lowrey, as the Smith's attorney, had a duty to advise the Smiths to seek and secure that advice. *Id.*

[63] *Id.* The court stated that it was "abundantly clear" that the parties had intended the balance of the account to go to Lowrey upon the deaths of the Smiths. *Id.* at 1160.

[64] *Id.* at 1161. The court noted its appreciation of Lowrey's position (i.e., that the Smiths were not only his clients but also his close personal friends and that he "was caught between a rock and a hard place") but maintained the position that Lowrey had not acted wisely when he agreed to become a cosignatory without the precaution of advising the Smiths to discuss the situation with someone else first. *Id.* In addition, the court stated that though the ruling could be seen as punishment, the court's conclusions could also be construed as a rule of caution to other attorneys when faced with a similar situation. *Id.* at 1162.

[65] *See supra* notes 15-16 and accompanying text.

[66] *See supra* notes 53-54, 61 and accompanying text.

[67] *See supra* notes 26, 31-33 and accompanying text.

[68] *See supra* notes 15-16, 21, 24-25, 45, 48 and accompanying text.

[69] *See supra* notes 33-34, 42-43, 62, 64 and accompanying text.

ing the third prong of the burden of proof in the pre-*Mullins* form,[70] has effectively reinstated the requirement that the grantor of the benefit obtain independent, competent advice prior to taking gratuitous action.[71] Historically, Mississippi case law has not distinguished undue influence cases by categorizing the particular relationships involved but instead has employed a single test which all persons, who have allegedly exercised undue influence, must satisfy.[72] Because the test to overcome a presumption of undue influence was enumerated in the premodified fashion, the court has set the stage for confusion among those in the legal profession.[73] Attorneys in Mississippi must now practice in the face of uncertainty with regard to both their own and their clients' burden of proof when attempting to overcome a presumption of undue influence.[74] Specifically, *Lowrey* could lead to two mutually exclusive conclusions—one, that the *Mullins* modification has been set aside thus reviving the pre-*Mullins* burden as to all persons, or two, that the more stringent pre-*Mullins* burden will only apply to undue influence cases involving allegations against lawyers.[75]

Kristina M. Crosswell

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[70] *See supra* notes 8, 25, 45 and accompanying text.

[71] *See supra* notes 8, 25, 45, 48 and accompanying text.

[72] *See supra* notes 15, 21, 24-25, 45, 48 and accompanying text.

[73] *See supra* notes 53-54, 61 and accompanying text.

[74] *See supra* notes 45, 48, 53, 54, 61 and accompanying text.

[75] *See supra* notes 8, 25, 45, 48, 61, 64 and accompanying text.

1990 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

In 1990, the Mississippi Supreme Court handed down thirty-six administrative law decisions. Due to space constraints, this review will concentrate on those decisions which changed or modified the law as it existed. This year's administrative law decisions basically fit into four categories. The categories include misconduct of attorneys and judges, worker's compensation, employment security commission (this will include cases arising from public employment), and decisions from the Mississippi State Tax Commission. Decisions from these four categories comprise the bulk of the 1990 administrative law decisions. Other areas in which administrative law opinions were rendered include: environmental law,[1] County Board of Supervisors,[2] County School Boards,[3] Public Service Commission,[4] and the Mississippi Health

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[1] United Cement Co. v. Safe Air for the Environment, 558 So. 2d 840, 842 (Miss. 1990) (no impropriety where assistant attorney general acts as hearing officer at waste burning permit hearing and standard of review requires finding of lack of substantial evidence, arbitrary or capricious action, lack of power, or violation of constitutional or statutory right to overturn Board decision).

[2] Cook v. Board of Supervisors, 571 So. 2d 932 (Miss. 1990) (under MISS. CODE ANN. § 41-55-7 (1972), which proscribes that counties may not contract with public ambulance services where there exists adequate private ambulance services, determination of adequate privately operated services is "essentially one of adjudicated fact" and standard of judicial review is arbitrary and capricious).

[3] Stone County Bd. v. McMaster, 573 So. 2d 753 (Miss. 1990) (MISS. CODE ANN. § 37-9-111 (Supp. 1990) allows School Board right to conduct hearings free from common law constraints and statutory or formal rules of evidence and procedure); *see* Tanner v.

Department.[5]

I. MISCONDUCT OF ATTORNEYS AND JUDGES

In *Fougerousse v. Mississippi State Bar Association*,[6] the Mississippi Supreme Court scrutinized the validity of a default judgment[7] against an attorney, where the trial was set without a scheduling order.[8] The court noted that while no scheduling order was devised in this instance, it was not a fatal taint to the proceeding.[9] The court concluded that Fougerousse's own lack of initiative in defending against the charges[10] and his failure to follow proper procedural channels[11]

Hazelhurst Mun. Separate School Dist., 427 So. 2d 977, 979 (Miss. 1983) (board allowed to consider evidence clearly hearsay).

[4] Mississippi Public Service Comm'n v. Columbus & Greenville Ry. Co., 573 So. 2d 1343 (Miss. 1990) (state administrative agency possesses only those powers "expressly granted" or "necessarily implied" and actions taken by agency outside these parameters are void).

[5] Magnolia Hosp. v. Mississippi State Dep't of Health, 559 So. 2d 1042, 1045 (Miss. 1990) (hospital's denial of certificate of need was not formulated on "undisclosed evidence and unpromulgated criteria" where administrative agency's record showed hospital did not attain minimum population standard set forth in 1986 State Health Plan).

[6] 563 So. 2d 1363 (Miss. 1990).

[7] *Fougerousse*, 563 So. 2d at 1364-65. The disciplinary proceedings against Fougerousse arose out of pending divorce actions and charged him with violating MISS. CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(b), DR 6-101(A)(3) (1971) and MISS. CODE ANN. § 73-3-35 (1972). *Fougerousse*, 363 So. 2d at 1363. A hearing on the matter was set for April 4, 1988, at 1:30 p.m. *Id.* at 1364. Fougerousse did not attend this hearing and the Tribunal issued a default judgment against him. *Id.* The Tribunal issued punishment on both counts in the form of ninety day suspensions, to run concurrently, and for Fougerousse to pay costs and restitution to the injured parties. *Id.* at 1364-65.

[8] *Fougerousse*, 563 So. 2d at 1365. Fougerousse contended that the hearing date was set in violation RULES OF DISCIPLINE OF THE MISSISSIPPI STATE BAR Rule 8.1 (1984),which requires that a scheduling order be set for such hearings. *Fougerousse*, 563 So. 2d at 1365. He also claimed that he received no notice of the hearing. *Id.* The Bar contended that a letter dated January 28, 1988, proposing April 4, 1988, as the hearing date, and an order setting the trial date for April 4, 1988, dated February 4, 1988, were in fact mailed to Fougerousse. *Id.*

[9] *Fougerousse*, 563 So. 2d at 1366. The court first noted its displeasure with the Bar that they could not prove that Fougerousse had received copies of the two notices sent to him. *Id.* at 1365. The court went on however, to point out that there was no doubt that Fougerousse had received a copy of the Bar's Formal Complaint. *Id.* at 1366. This was evidenced by Fougerousse's Response to the Formal Complaint. *Id.* In the court's opinion, Fougerousse "was on notice that the 'wheels of justice' had begun to turn and his level of concern and attention should have reached its highest possible point." *Id.*

[10] *Id.* The court stated that "[y]es, a default judgment is a serious matter but so is not taking the proper steps to avoid one." *Id.*

[11] *Id.* After receiving notice of the default judgment, Fougerousse should have pur-

were largely the reasons for the default judgment and consequently the court held the decision of the Tribunal.[12]

The Mississippi Supreme Court reviewed for the first time an attorney's disbarment based on a civil judgment involving conversion in *Mississippi State Bar v. Nichols*.[13] The complaint for disbarment arose under a Mississippi State Bar Disciplinary Rule which provides for the discipline of attorneys against whom civil judgments pertaining to honesty have been rendered.[14] In *Nichols*, the civil judgment was based on the attorneys' alleged conversion of funds from a mortgage company.[15] In an action by the mortgage company against Nichols, the trial judge issued partial summary judgment against Nichols for liability based on the conversion.[16] The partial summary judgment against Nichols was later changed to a final judgment.[17] Nichols responded to the Bar Complaint by alleging that since he was given no notice of the final judgment in the conversion suit, it was not a proper judgment to be considered under the RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR.[18] In deciding to uphold the Tribunal's recommendation of disbarment, the Mississippi Supreme Court decided that the civil judgment against Nichols was sufficient to fall within the scope of the disciplinary rule.[19] The court explained that even though Nichols received no notice of the final judgment in favor of National Mortgage Com-

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sued his "lack of notice" contention under MISS. R. CIV. P. 55(c), 60. *Fougerousse*, 563 So. 2d at 1365-66.

[12] *Fougerousse*, 563 So. 2d at 1366. The court found no error in the record to warrant reversal of the Tribunal's decision. *Id.* The court also upheld the two 90-day suspensions as not being "overly punitive." *Id.* at 1367.

[13] 562 So. 2d 1285 (Miss. 1990).

[14] RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR Rule 6(c) (1984). The Rule provides for the immediate suspension of any attorney against whom a final "civil judgment based upon clear and convincing evidence of fraud, misrepresentation, dishonesty, deceit, or willful failure to account for money or property of a client" has been rendered. *Id.*

[15] *Nichols*, 562 So. 2d at 1285-86. Nichols, the attorney, allegedly converted $53,811.29 from the National Mortgage Company "by allegedly failing to pay off a prior loan from the proceeds of a refinancing loan." *Id.*

[16] *Id.* at 1286-87 n.1. Nichols did not object to the partial summary judgment and Trial Judge Breland Hilburn signed and entered the partial summary judgment in the office of the Hinds County Circuit Clerk on November 16, 1987. *Id.*

[17] *Id.* National Mortgage Company decided to forego its quest for punitive damages and the final judgment was based on Judge Hilburn's earlier findings in the partial summary judgment dated November 16, 1987. *Id.*

[18] *Id.* at 1286 (quoting defendant Nichols' response). " 'The judgment is beyond the scope of Rule 6 due to the fact that the judgment was heard and entered without notice to the respondent.' " *Id.*

[19] *Id.* at 187-88.

pany, he received adequate notice of the partial summary judgment issued against him on the issue of conversion liability.[20] The court concluded by upholding the civil judgment as a ground for disbarment.[21]

In *Mississippi State Bar v. Nixon*,[22] the court was presented with the dilemma of whether the three-year waiting period to apply for readmission to the State Bar runs from the disbarred attorney's date of disbarment or his date of suspension while pursuing appeal.[23] In *Nixon*, former federal judge Walter L. Nixon sought readmission to the Mississippi State Bar following his disbarment for conviction in federal court on two counts of perjury.[24] Nixon argued that the three-year period should be dated back to the date of his indefinite suspension.[25] Nixon based his argument on the premise that it is unconstitutional to force an attorney pursuing legal appeal of his convictions to wait longer for possible reinstatement than one who does not pursue an appeal.[26] The court dismissed this argument and relied on *McIntosh v. Mississippi State Bar*, 449 So. 2d 1203 (Miss. 1984), which determined that the three-year period for possible reinstatement begins with the final disbarment order.[27] The court also dismissed Nixon's premise that like criminal defendants, disbarred attorneys should be "given credit for time served" while waiting appeal.[28] In conclusion the court held that Nixon would not be able to petition for readmission to the Mississippi State Bar until three years after his effective disbarment.[29] The court also handed down several other opinions on this topic dealing with the punishment for attorney/judicial misconduct.[30]

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[20] *Id.* at 1287 n.1. The court reasoned that Nichols did have adequate notice of the partial summary judgment against him for conversion which was "the basis for the Bar's formal complaint against Mr. Nichols under Rule 6(c) of the Rules of Discipline." *Id.*

[21] *Id.* at 1287-88. The court also noted that Nichols had pled guilty to a felony charge of embezzlement and subsequently was convicted. *Id.* at 1288. The court explained that this conviction met the requirements for disbarment under RULES OF DISCIPLINE OF THE MISSISSIPPI STATE BAR Rule 6(a) (1984), which provides for the disbarment of attorneys convicted of felonies. *Nichols*, 562 So. 2d at 1288.

[22] 562 So. 2d 1288 (Miss. 1990).

[23] *Nixon*, 562 So. 2d at 1289. The problem before the court was to determine if the date of an attorney's disbarment begins when they were officially disbarred or if it may be retroactively dated back to the date they were suspended from the practice of law while awaiting an appeal of the proceedings which were the basis of their disbarment. *Id.*

[24] *Nixon*, 562 So. 2d at 1289. Nixon was convicted of perjury in the United States District Court for the Southern District of Mississippi on February 9, 1986. *Id.* The Mississippi State Bar commenced disbarment proceedings against Nixon April 18, 1986, under the RULES OF DISCIPLINE FOR THE MISSISSIPPI STATE BAR Rule 6(a) (1984). *Nixon*, 562 So. 2d at 1289. Nixon asked for a stay of any disbarment action and the Mississippi State Bar moved for an order to indefinitely suspend Nixon from the practice of law. *Id.* The Mississippi Supreme Court granted the order and indefinitely suspended Nixon from practicing law in Mississippi. Mississippi State Bar v. Nixon, 494 So.2d 1388 (Miss. 1986). A final order disbarring Nixon was issued by the Mississippi Supreme Court on November 22, 1989. *Nixon*, 562 So.2d at 1290.

[25] *Nixon*, 562 So. 2d at 1290.

[26] *Id.* at 1291. The time lapse in the period between Nixon's indefinite suspension and his official disbarment resulted from Nixon's numerous appeals of his perjury convictions. *Id.* at 1284-90.

II. WORKERS' COMPENSATION

The court once again reiterated its position of allowing workers' compensation claims to be reopened after final settlement where justice required in *Metal Trims Industries Inc., v. Stovall.*[31] In *Stovall*, the Commission affirmed a finding by the A.L.J. that the claimant's post-settlement injuries were causally connected to her work related injury so as to allow the reopening of her claim.[32] On appeal, the Mississippi Supreme Court stated that the reopening of workers' compensation claims were permissible "if justice so required."[33] The court concluded its affirmance of the Commission's ruling by noting that where an administrative agency makes a ruling based on substantial evidence, that ruling will be upheld.[34]

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[27] *Nixon*, 562 So. 2d at 1291-92. "[T]he three (3) year period of time before a Petition for Reinstatement could be filed began running 'from the order of disbarment and there is no 'relation back'.' " *Id.* at 1292 (quoting *McIntosh*, 449 So. 2d at 1204).

[28] *Id.* at 1292. The court noted that "disciplinary proceedings are only 'quasi-criminal' in nature." *Id.* (citing Mississippi State Bar v. Attorney L, 511 So. 2d 119, 121-22 (Miss. 1987); Levi v. Mississippi State Bar, 436 So. 2d 781, 783 (Miss. 1983)). Because of their unique situation involved in disciplinary proceedings all of the rules of criminal procedure are not applicable. *Id.* at 1292.

[29] *Id.* at 1293.

[30] Mississippi State Bar v. Odom, 573 So. 2d 710 (Miss. 1990) (where attorney enters guilty plea to embezzlement and court withholds adjudication of guilt, guilty plea is sufficient to disbar attorney under Rule 6(b)); Mississippi Judicial Performance Comm'n v. Cowart, 556 So. 2d 1251, 1255 (Miss. 1990) (fine of $500 and public reprimand not excessive punishment for violating numerous judicial canons and statutes); Mississippi State Bar v. Odom, 566 So. 2d 712, 716 (Miss. 1990) (attorney's commingling of client's funds demonstrates his "unfitness to be a practicing lawyer" and necessitated three year suspension from practice of law); Mississippi Judicial Performance Comm'n v. Walker, 565 So. 2d 1117 (Miss. 1990) (judge given public reprimand for misuse of contempt power even though case involved one offense which was judge's first offense); Mississippi State Bar v. Varnando, 557 So. 2d 558, 559 (Miss. 1990) (court found that State Bar had not shown by clear and convincing evidence that attorney deserved punishment); Mississippi Judicial Performance Comm'n v. Peyton, 555 So. 2d 1037, 1038 (Miss. 1990) (judge publicly censured for excessive political activity).

[31] 562 So. 2d 1293 (Miss. 1990).

[32] *Metal Trims Indus.*, 562 So. 2d at 1296. The claimant, Annie Stovall, suffered two back injuries while employed with Metal Trims Industries. *Id.* Stovall settled her claim by "9(i)" agreement. *Id.* at 1295. Stovall attempted to reopen her workers' compensation claim on the grounds "that the true facts of her condition were misrepresented to the Commission." *Id.* Metal Trim Industries tried to show that Stovall's worsening condition was due to a "degenerative spinal condition." *Id.* The administrative law judge agreed

In *Walls v. North Mississippi Medical Center*,[35] the court determined that a student nurse undergoing clinical training at a hospital was for purposes of the Mississippi Workers' Compensation Act, an apprenticeship employee.[36] The court noted the necessity of an employment relationship in order to claim compensation benefits and set forth a three-part test to be used in determining if an employer-employee relationship was present.[37] Applying the three factors, consent, consideration, and control, to Walls' case, the court concluded that Walls was an apprentice employee of the hospital due to the fact that the training she received qualified as "wages" or "consideration" as required by the test.[38] The court reversed the earlier determinations of

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with Stovall and allowed the claim to be reopened. *Id.* This finding was affirmed by the Mississippi Workers' Compensation Commission. *Id.*

[33] *Id.* at 1296 (citing Yazoo Mfg. Co. v. Shaffer, 254 Miss. 35, 179 So. 2d 784 (1965)). *See* DUNN'S, MISSISSIPPI WORKERS' COMPENSATION PRACTICE, § 339 (3d ed. 1982) (commission may overturn release where there exists mistake as to gravity of injury).

[34] *Metal Trims Indus.*, 562 So. 2d at 1296-97. The court stated that "[a]bsent an error of law, and if the decision of the Commission is based upon substantial evidence, the decision will be affirmed on appeal." *Id.* at 1296-97. The court added however, that they were not " 'rubber stamps' " and would be quick to reverse any commission ruling not meeting the standard. *Id.* at 1297.

[35] 568 So.2d 712 (Miss. 1990).

[36] *Walls*, 568 So. 2d at 718. The claimant was a student nurse who injured her back while attempting to move a patient. *Id.* at 713. The injury occurred while the claimant was involved in clinical training at the hospital. *Id.* The claimant subsequently had to quit her nursing studies as a result of the injury. *Id.* The claimant filed a claim for compensation under the Mississippi Worker's Compensation Act and was denied benefits by the administrative law judge, the Workers' Compensation Commission, and the Lee County Circuit Court. *Id.* The basis for the denial was that the claimant, as a student nurse undergoing training in the hospital, was not an employee. *Id.* The Mississippi Supreme Court reversed and rendered, finding the claimant to be covered under the Act. *Id.* at 718.

[37] *Id.* at 715. The three-part test announced by the court stated

> [t]hat relationship is evidenced by the "contract of hire or apprenticeship, oral or written, express or implied." The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the service rendered, and (3) control by the employer over the employee."

Id. (quoting Barragan v. W.C.A.B., 195 Cal. App. 2d 637, 240 Cal. Rptr. 811, 814-15 (Cal. Ct. App. 1987).

[38] *Walls*, 568 So. 2d at 718. Though no contract existed between Walls and the hospital, the court impliedly found Wall's to be an employee. *Id.* at 716. The training re-

Walls' status and found her eligible for compensation benefits.[39]

In *Smith v. Container General Corp.*[40] the court faced the question of whether injuries received at work due to an "alcohol withdrawal seizure" were compensable under the workers' compensation statute.[41] The court allowed recovery by the claimant, comparing the alcohol withdrawal seizure to an earlier case where recovery was allowed when an employee fell as a result of a grand mal seizure.[42] The court in overruling the earlier findings that Smith was not entitled to benefits,stated that it was well established that any employee injury which results from falling on an employer's floor constitutes a "confrontation with a condition of employment" and is compensable.[43]

In *R.C. Petroleum, Inc. v. Hernandez*,[44] the issue presented involved the circuit court's power to reverse findings of the Commission.[45] The Mississippi Supreme Court noted that it is the Commis-

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ceived by Walls adequately amounted to a wage as required by the statute. *Id.* at 718; *see* Betts v. Ann Arbor Public Schools, 903 Mich. 507, 271 N.W.2d 498, 501 (1978) (student teacher teaching at school as part of degree requirements was covered under compensation act for injuries received while teaching). The court found the issue of control easy as Walls was under the guidance of hospital personnel in performing her duties. *Walls*, 568 So. 2d at 718.

[39] *Walls*, 568 So. 2d at 718.

[40] 559 So. 2d 1019 (Miss. 1990).

[41] *Smith*, 559 So. 2d at 1020-21. The claimant, Pearly Smith, had injured his elbow while at work on March 29, 1983. *Id.* at 1020. After returning to work, Smith fell down on the job as a result of an alcohol withdrawal seizure on February 29, 1984 *Id.* at 1020-21. Smith's compensation claim for injuries received in this fall were denied by the administrative law judge, the Commission and the Harrison County Circuit Court. *Id.* at 1021.

[42] *Id.* at 1022. The court noted the controlling authority to be Chapman v. Hanson Scale Co., 495 So. 2d 1357 (Miss. 1986). *Smith*, 559 So. 2d at 1022. In *Chapman*, the worker was fatally injured after falling as a result of a grand mal seizure. *Chapman*, 495 So. 2d at 1358. The *Chapman* court allowed recovery, finding the employer's floor to be "an appurtenance of the employer's premises the same as any other piece of equipment." *Id.* at 1360.

[43] *Smith*, 559 So. 2d at 1022. In finding Smith's fall to be a compensable claim, the court stated,

> "*Chapman* established as a basic tenet of Workers' Compensation Law in Mississippi that an injury sustained by an employee resulting from a fall upon a work premise floor is a confrontation with a condition of employment which contributed to the employee's injury and 'arises out of and in the course of employment' as a matter of law."

Id. Under this reasoning claims such as those of Smith would be compensable. *Id.*

[44] 555 So. 2d 1017 (Miss. 1990).

[45] *R.C. Petroleum*, 555 So. 2d at 1020-21. Prudence Hernandez suffered a work related injury on September 15, 1982. *Id.* at 1019. The administrative law judge found R.C. Petroleum, Hernandez' employer, liable for Hernandez' medical expenses. *Id.* at 1020.

sion's duty to act as the "ultimate fact-finder" in workers' compensation cases.[46] In deciding that the circuit court in the instant case was wrong to have overturned the Commission's ruling, the court reannounced the rule that where the Commission's decision rests on "substantial evidence," it may not be reversed even if the evidence presented would not sway the reviewing court were it the trier of fact.[47] The court determined that in this instance, the Commission's ruling was based upon substantial evidence and the circuit court erred in reversing it.[48]

Other Mississippi Workers' Compensation cases were handed down concerning penalties for unpaid installments,[49] and the classification of contact dermatitis as a compensable injury under the statute.[50]

III. EMPLOYMENT SECURITY COMMISSION

In *Prentiss Manufacturing Co. v. Mississippi Employment Security Commission*,[51] the court laid down the criteria by which corporations could be deemed "successor corporations" and statutorily taxed at the unemployment tax rate of the predecessor corporation.[52] The

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The administrative law judge did not however, allow Hernandez' claim for temporary and permanent compensation for the injury. *Id.* On appeal, the Mississippi Worker's Compensation Commission upheld the finding of the administrative law judge. *Id.* On November 22, 1985, the Commission's ruling was overturned by the Adams County Circuit Court who ordered R.C. Petroleum to pay Hernandez temporary total disability. *Id.* R.C. Petroleum appealed the decision of the circuit court to the Mississippi Supreme Court. *Id.*

[46] *Id.* at 1021 (citing Olen Burrage Trucking Co. v. Chandler, 475 So. 2d 437 (Miss. 1985).

[47] *Id.* at 1021-22 (citing *Olen Burrage Trucking*, 475 So. 2d at 439).

[48] *Id.* at 1024. Another Mississippi case on this same subject was decided later in the year. *See* Hardin's Bakeries v. Dependent of Harrell, 566 So. 2d 1261, 1266 (Miss. 1990) (circuit court erred in awarding full benefits where Commission's award of two-thirds benefits was supported by substantial evidence).

[49] International Paper Co. v. Kelley, 562 So. 2d 1298, 1302 (Miss. 1990) (unpaid medical expenses not subject to statutory penalties).

[50] Piper Industries, Inc. v. Herod, 560 So. 2d 732, 733-34 (Miss. 1990) (employee's development of contract dermatitis was compensable as "accidental injury" as defined by Mississippi Worker's Compensation Act).

[51] 558 So. 2d 866 (Miss. 1990).

[52] *Prentiss Mfg. Co.*, 558 So. 2d at 868. MISS. CODE ANN. § 71-5-355(2)(b)(v) (Supp. 1990) provides;

> When any employing unit in any manner succeeds to or acquires the organization, trade, business, or substantially all the assets thereof of an employer, . . . and continues such organization, trade or business, the experience-rating and payroll records of the predecessor employer shall be transferred as of the date of acquisition to the successor employer for the purpose of rate

problem before the court arose in *Prentiss Manufacturing* when a knit shirt manufacturer moved into the facilities of a military shirt manufacturer that had closed its operations.[53] The Mississippi Employment Security Commission then attempted to assess the operating manufacturer for unemployment contributions at the rate assessed to the former manufacturer.[54] The Mississippi Supreme Court held that the succeeding corporation in the instant case could not be deemed a statutory "successor" corporation as it did not meet the necessary elements required by the statute.[55]

Four cases were decided by the court which delineated circumstances under which a terminated employee would or would not be eligible for unemployment benefits.[56] In *Ray v. Bivens*,[57] the court an-

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determination."

Id.

[53] *Prentiss Mfg. Co.*, 558 So. 2d at 866-67. Iuka Shirt, a military shirt manufacturer, announced that it was planning to close its operations and move to a new location. *Id.* at 866. At the bequest of city leaders, Prentiss Manufacturing Co., a producer of knit shirts, agreed to move into Iuka Shirt's plant and start a production facility. *Id.* Prentiss Manufacturing purchased $175,000 worth of equipment from Iuka Shirt and hired some of Iuka Shirt's former employees. *Id.* at 867. This was the only contact between the two manufacturers. *Id.*

[54] *Id.* The Commission attempted to apply Iuka Shirts unemployment contribution rate to Prentiss Manufacturing on the grounds that it was a "successor corporation" under MISS. CODE ANN. § 71-5-355(2)(b)(v) (Supp. 1990). *Prentiss Mfg. Co.*, 558 So. 2d at 867.

[55] *Prentiss Mfg. Co.*, 558 So. 2d at 868. The court stated that Prentiss Manufacturing had not met the conditions of the statute which require the successor corporation to succeed or acquire the former corporation, acquire "substantially all the assets of the predecessor, and . . . continue such organization, trade or business." *Id.* In the court's opinion, the two entities were "distinct and separate." *Id.* The court stated that "[t]o require Prentiss Manufacturing to be responsible for rate payments based upon Iuka Shirt's experience would be the same as assuming a debt Prentiss Manufacturing did not make." *Id.*

[56] *See* Ray v. Bivens, 562 So. 2d 119, 120 (Miss. 1990) (employee discharged for repeated sleeping while at work in dangerous area was guilty of misconduct under statute and disqualified from receiving unemployment benefits); Mississippi Employment Sec. Comm'n v. Martin, 568 So. 2d 725, 728-29 (Miss. 1990) (discharged employee not entitled to unemployment benefits where discharge resulted from absenteeism due to alcohol dependency treatment); Mississippi Employment Sec. Comm'n v. Phillips, 562 So. 2d 115, 118 (Miss. 1990) (employee was entitled to unemployment compensation where he was fired for refusing to undertake job activities that reasonable person would have considered extremely dangerous when employee had no other alternative); City of Corinth v. Cox, 565 So. 2d 1142, 1143-44 (Miss. 1990) (discharged fire fighter was not entitled to unemployment benefits where he was discharged for plea of *nolo contendre* to charge of sale of cocaine, even though he did not plead guilty nor was adjudged guilty).

[57] 562 So. 2d 119 (Miss. 1990).

nounced that an employee discharged for sleeping on the job was not entitled to employment benefits as he was guilty of misconduct related to his work.[58] The court further proclaimed in *Mississippi Employment Security Commission v. Martin*[59] that unemployment benefits would not be available to an employee who was terminated by his employer for absenteeism while seeking treatment for alcohol dependency.[60] In *Mississippi Employment Security Commission v. Phillips*,[61] the court held that an employee was entitled to unemployment benefits where they were dismissed for walking off a job that a reasonable prudent person would believe posed serious danger when the employee had no other options.[62] The Mississippi Supreme Court held in *City of Corinth v. Cox*[63] that a plea of nolo contendre to the charge of sale of cocaine was sufficient misconduct to deny a discharged fire fighter unemployment benefits where he was terminated as a result of the charge and plea.[64] The Mississippi Supreme Court provided increased protection for probationary state employees with its decision in *Gill v. Mississippi Department of Wildlife Conservation*.[65] In *Gill*, the court held that probationary state employees are entitled to certain rights among which are the right to be free in their own "political opinion or affiliation" and to be secure from "political interference."[66] The court stated that this protection extends not only to those employees vocal in their political expressions, but also to the employee with no political views or connections.[67]

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[58] *Ray*, 562 So. 2d at 120. The court noted that under Mississippi statute, unemployment benefits may not be collected by an employee discharged for misconduct related to his work. *Id.* (citing MISS. CODE ANN. § 71-5-513A(1)(b) (1972)). In the court's opinion, Ray's sleeping met the level of misconduct contemplated by the statute. *Id.* at 120-21.

[59] 568 So. 2d 725 (Miss. 1990).

[60] *Martin*, 568 So.2 d at 728-29. The court opined that "[t]he State of Mississippi recognizes alcoholism as a serious problem, but does not label it as "sickness' or 'disease'." *Id.* at 727.

[61] 562 So. 2d 115 (Miss. 1990).

[62] *Phillips*, 562 So. 2d at 118.

[63] 562 So. 2d 1142 (Miss. 1990).

[64] *City of Corinth*, 562 So. 2d at 1143-44. The court stated that "[r]egardless of the legal aspects of a plea of nolo contendre, it creates an implication of guilt." *Id.* at 1144.

[65] 574 So. 2d 586 (Miss. 1990).

[66] 574 So. 2d at 594. In the court's eyes, "[p]olitical opinion and affiliation must necessarily include their negatives." *Id.*

[67] *Id.* The aggrieved probationary employee claimed he was discharged from his position as a game warden due to the actions of elected political officials. *Id.* at 588. The Employees' Appeal Board agreed with the finding of the board hearing officer and found that the employee should be reinstated with back pay. *Id.* at 589. The Mississippi De-

Other administrative opinions handed down by the Mississippi Supreme Court covered such areas as the right to terminate state employees for refusal to take a polygraph test,[68] and review of state employee termination.[69]

IV. TAX COMMISSION

In *United States v. Mississippi State Tax Commission*,[70] the question arose as to when may state tax liens be given priority over tax liens held by the federal government.[71] The Mississippi Supreme Court determined that a state tax lien will be given priority when it becomes "choate" prior to the time in which the federal lien arises.[72] Thus, even when dealing with the federal government, the court adhered to the well established rule that " 'the first in time is the first in right'."[73] Other opinions rendered by the court in the area of taxation encompassed the following subjects: creation of subsidiary as a deductible expense,[74] assessment of a private contractor at the rate of a public ser-

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partment of Wildlife and Conservation appealed this order to the Hinds' County Circuit Court. *Id.* at 590. The circuit court overruled the order finding that Gill, as a probationary employee was "protected only in his political opinions and affiliations" and not from political interferences. *Id.*

[68] Jackson v. Hudspeth Mental Retardation Center, 573 So. 2d 750 (Miss. 1990) (termination of state employee for refusal to take polygraph test not unconstitutional).

[69] Bulloch v. City of Pascagoula, 574 So. 2d 637 (Miss. 1990) (employee falling under Civil Service Act must follow civil service method of review before seeking judicial relief); Jackson Police Dept. v. Lawrence, 562 So. 2d 84, 87 (Miss. 1990) (appellants ultimately responsible for filing transcript with circuit court for review of Civil Service Commission hearing); Hood v. Mississippi Dept. of Wildlife Conservation, 571 So. 2d 263 (Miss. 1990) (civil service appeals process is competent to entertain charges of unconstitutional treatment brought by terminated employees).

[70] 574 So. 2d 613 (Miss. 1990).

[71] *Mississippi State Tax Comm'n*, 574 So. 2d at 614. The state and federal governments had procured liens against Gamco, Inc. for failure to pay taxes. *Id.* at 615. Both parties tried to collect on these assessments by garnishing the proceeds of a contract owed to Gamco, Inc., by the Mississippi State Highway Commission. *Id.*

[72] *Id.* at 617 (citing United States v. Equitable Life, 384 U.S. 323, 327-28 (1966)).

[73] *Id.*-7 (citing United States v. National Bank of Commerce, 472 U.S. 713 (1985)).

[74] Purcell Co. v. Mississippi State Tax Comm'n, 569 So. 2d 297, 302 (Miss. 1990) (where subsidiary is created by parent corporation out of business necessity; parent corporation may deduct expenditures paid to cover subsidiary's expenses as ordinary and necessary business expense).

vice corporation,[75] and whether the International Registration Plan may be applied to commercial passenger buses.[76]

John M. Lassiter, Jr.

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[75] Mississippi State Tax Comm'n v. Mosselle Fuel Co., 568 So. 2d 720, 723-25 (Miss. 1990) (tax commission erred in taxing property owned by corporation selling natural gas under contract to private customers at rate assessed to public utility corporations).

[76] Mississippi State Tax Comm'n v. Trailways Lines, Inc., 567 So. 2d 228, 233 (Miss. 1990) (MISS. CODE ANN. § 27-19-7(2) (1972) forbids use of International Registration Plans with regard to passenger buses).

CIVIL PROCEDURE

INTRODUCTION

By the end of the 1990 term, the Mississippi Supreme Court had rendered forty-six decisions dealing with civil procedure matters. This review will focus on four decisions which have clarified civil procedure issues. The topics discussed include setting aside judgments,[1] service of process,[2] affirmative defenses,[3] and conflicts between statutes and the Mississippi Court Rules.[4]

Other opinions handed down by the court dealt with appeals,[5] collateral estoppel,[6] criminal contempt of court,[7] deraignment of title,[8] directed verdict,[9] execution,[10] expert testimony,[11] fees and costs,[12] full faith and credit,[13] injunctive relief,[14] interpleader,[15] involuntary dismissal,[16] jurisdiction,[17] master's reports,[18] notice,[19] pre-emption,[20]

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[1] King v. King, 556 So. 2d 716 (Miss. 1990)(failure to conform to MISS. R. CIV. P. 40(b) requirements for setting trial date is grounds for setting aside judgment).

[2] Young v. Huron Smith Oil Co., 564 So. 2d 36 (Miss. 1990)(failure timely to raise defense of insufficiency of service of process acts as waiver of that defense).

[3] Hertz Commercial Leasing Div. v. Morrison, 567 So. 2d 832 (Miss. 1990)(defense of penalty is in nature of affirmative defense of illegality and must be specifically pled).

[4] Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990)(where Mississippi Code and Supreme Court Rules conflict, Supreme Court Rules control).

[5] Schmitt v. Capers, 573 So. 2d 773 (Miss. 1990)(although trial court may extend time for notice of appeal upon showing of excusable neglect, generally notice of appeal must be filed within 30 days of entry of judgment or order appealed from; time limit should be strictly enforced); Moore v. Sanders, 569 So. 2d 1148 (Miss. 1990)(failure to comply with MISS. CODE ANN. § 11-51-75 (1972) requirement of filing bill of exceptions will cause appeal from decision of board of supervisors to be untimely divesting circuit court of jurisdiction despite fact parties consent to jurisdiction); Cortesi v. Cortesi, 566 So. 2d 702 (Miss. 1990)(no appeal of right exists from judgment which is not final); Holliman v. Dale, No. 07-58867 (Miss. Dec. 27, 1990)(application of the 15% appeal penalty required by MISS. CODE ANN. § 11-3-23 (1972) is mandatory); Pittman v. Commonwealth Nat'l Life Ins. Co., 562 So. 2d 73 (Miss. 1990)(Mississippi Supreme Court is without jurisdiction to hear appeal brought pursuant to Mississippi Supreme Court Rule 4(a) if not brought within six months of order appealed from).

[6] Jordan v. McKenna, 573 So. 2d 1371 (Miss. 1990) (adjudication of fact in criminal proceeding will be given preclusive effect provided all other elements of collateral estoppel are met).

[7] Mabry v. Howington, 569 So. 2d 1165 (Miss. 1990)(each element of criminal contempt must be proved beyond reasonable doubt).

[8] Hesdorffer v. Pearl River Valley Water Supply Dist., 572 So. 2d 1209 (Miss. 1990) (MISS. CODE ANN. § 11-17-35 (1972) is supplanted by MISS. R. CIV. P. 81(h), Appendix B).

[9] Wall v. Swilley, 562 So. 2d 1252 (Miss. 1990)(where liability is not issue and fact of damage is clear, court may not direct verdict against plaintiff unless evidence is so speculative that no reasonable juror could find more than nominal damages).

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[10] Burchinal v. Whitehead, 571 So. 2d 281 (Miss. 1990)(judgment creditor may, pursuant to MISS. R. CIV. P. 69(b), conduct post-judgment discovery of third persons, but discovery is limited in scope to third party's knowledge of assets which could be used to satisfy judgment).

[11] Palmer v. Biloxi Regional Medical Center, 564 So. 2d 1346 (Miss. 1990)(trial judge may determine qualifications of expert during summary judgment stage of litigation).

[12] Carter v. Clegg, 557 So.2d 1187 (Miss. 1990)(court may order plaintiff to pay costs to defendant in voluntary non-suit, but costs must be proved by direct evidence and must be for items of no use in future litigation of same claim); Lovett v. Anderson, 573 So. 2d 758 (Miss. 1990)(award of attorney's fees must be supported by evidence of fees); Lowrey v. Forrest County Bd. of Supervisors, 559 So. 2d 1029 (Miss. 1990) (fees of court appointed *guardian ad litem* taxed as court cost); Saddler v. Saddler, 556 So. 2d 344 (Miss. 1990)(attorney is not entitled to fees in area and for activities where attorney proceeds in total disregard of plain language of long-established rules and prior practice).

[13] Davis v. Davis, 558 So. 2d 814 (Miss. 1990)(Mississippi affords full faith and credit to final judgments of other states and federal courts unless foreign court did not have jurisdiction or if foreign judgment obtained by false representation without which judgment would not have been rendered).

[14] Sta-Home Health Agency v. Umphers, 561 So. 2d 1258 (Miss. 1990)(injunctive relief should not issue to party seeking to enjoin activity he induced); Moore v. Sanders, 558 So. 2d 1383 (Miss. 1990)(injunctive relief is not appropriate where complete and adequate remedy at law is available).

[15] Holliman v. Charles L. Cherry & Assoc's, 569 So. 2d 1139 (Miss. 1990)(in interpleader action where parties defendant agree to certain facts prior to trial which establish one of parties as sole heir at law of record title holder of property in question, proper to place burden of proof on other party defendant to prove claim).

[16] Wallace v. Jones, 572 So. 2d 371 (Miss. 1990)(court may dismiss action involuntarily under Rule 41(b) for failure to show right to relief, for want of prosecution, or failure to comply with rules of court or any court order).

[17] Chenier v. Chenier, 573 So. 2d 699 (Miss. 1990)(although party not otherwise amenable to suit enjoys immunity from civil process when specially appears in this state as party or witness; person who is otherwise amenable may not claim protection of special appearance at judicial proceeding); Petters v. Petters, 560 So. 2d 722 (Miss. 1990)(debt incurred in Mississippi as a result of conduct within Mississippi is sufficient to render defendant amenable to personal jurisdiction).

[18] Thornton v. Thornton, 562 So. 2d 112 (Miss. 1990)(use of MISS. R. CIV. P. 53 requires adherence to specifics of rule so that party must be afforded opportunity to review master's report prior to filing and approval by chancellor).

[19] Walker v. Parnell, 566 So. 2d 1213 (Miss. 1990)(clerk must provide notice to parties of motion to dismiss for failure to prosecute pursuant to MISS. R. CIV. P. 41(d) to allow parties opportunity to oppose motion).

[20] Petters v. Petters, 560 So. 2d 722 (Miss. 1990)(10 U.S.C. § 1408(c)(4) (1982) preempts Mississippi's long-arm statute in matters adjudicating rights to serviceman's pension).

recusal,[21] relief from judgment,[22] requests for admissions,[23] sanctions,[24] service of process,[25] standing,[26] statute of limitations,[27] summary judgment,[28] Uniform Circuit Court Rules,[29] and voluntary non-suits.[30]

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[21] Herring v. Herring, 571 So. 2d 239 (Miss. 1990)(once order for recusal has been entered, recused judge may not hear any matters pertaining to case absent valid order vacating recusal).

[22] Cannon v. Cannon, 571 So. 2d 976 (Miss. 1990)(attorney's conflicting trial date is good cause for continuance of trial and good cause for relief from default judgment entered after refusal of continuance by court); Gray v. Gray, 562 So. 2d 79 (Miss. 1990)(newly discovered evidence relied upon to support motion for relief from judgment, pursuant to Miss. R. Civ. P. 60(b)(3), must have been in existence at time of trial or judgment); Johnson v. Weston Lumber & Supply Co., 566 So. 2d 466 (Miss. 1990)(failure to provide notice to party not represented pursuant to Miss. R. Civ. P. 60(b)(6)); Mississippi Bureau of Narcotics v. 1972 Chevrolet Nova Automobile, 573 So. 2d 787 (Miss. 1990)(court may not set aside forfeiture order on own motion; there must be motion or action brought by party); Overbey v. Murray 569 So. 2d 303 (Miss. 1990)(where final judgment is void, there is no specific time limit to obtain relief from judgment pursuant to Miss. R. Civ. P. 60(b)(4) other then requirement that motion be made within reasonable time).

[23] Martin v. Simmons, 571 So. 2d 254 (Miss. 1990)(untimely response to request for admissions will result in matter being deemed admitted); Skipworth v. Rabun, 568 So. 2d 289 (Miss. 1990)(where response to request for admissions is untimely, matter is deemed admitted under Miss. R. Civ. P. 36, unless good and sufficient excuse shown); Sawyer v. Hannon, 556 So. 2d 696 (Miss. 1990)(failure to timely respond to requests for admissions will cause them to be deemed admitted).

[24] Palmer v. Biloxi Regional Medical Center, 564 So. 2d 1346 (Miss. 1990)(court may dismiss entire suit as sanction under Miss. R. Civ. P. 37, for failure to comply with discovery, but other party's dilatory conduct will become relevant and mitigating factor in those situations).

[25] Alpaugh v. Moore, 568 So. 2d 291 (Miss. 1990)(for purposes of service of process, person's "usual place of abode" is place person is actually living when service is made).

[26] Gaddy v. Bucklew, No. 89-1142 (Miss. Dec. 27, 1990)(members of City Council have no standing to prosecute appeal in official capacities unless council approves appeal by majority vote); Harrison County v. City of Gulfport, 557 So. 2d 780 (Miss. 1990)(home county has both standing and legal authority to oppose annexations by municipalities located wholly within county).

[27] McMichael v. Nu-Way Steel & Supply, 563 So. 2d 1371 (Miss. 1990)(party claiming defense of statute of limitations bears burden of establishing date from which period runs).

[28] Lovett v. Anderson, 573 So. 2d 758 (Miss. 1990)(moving party must persuade court they are entitled to summary judgment); Martin v. Simmons, 571 So. 2d 254 (Miss. 1990)(summary judgment may only be granted when there exists in record no genuine issue of material fact); American Legion Ladnier Post #42 v. City of Ocean Springs, 562 So. 2d 103 (Miss. 1990)(summary judgment is to be used to decide whether there are questions regarding material facts, not to decide those questions); Palmer v. Biloxi Regional Medical Center, 564 So. 2d 1346 (Miss. 1990)(dismissal under Miss. R. Civ. P. 56, can only be based on insufficiency of evidence, not on a violation of procedure in failure to respond to discovery); Crain v. Cleveland Lodge 1532, 560 So. 2d 142 (Miss. 1990)(oral

I. Miss. R. Civ. P. 40(b)

In *King v. King*,[31] the Court addressed the issue of whether the failure to conform to Rule 40(b) constituted good cause from which to grant relief from judgment. David King moved to set aside a default judgment entered in favor of his ex-wife, on the ground that the trial date had been improperly set.[32] Although both parties had tentatively agreed to an October sixth trial date, Mr. King had not finally agreed to that date.[33] On September twenty-ninth, Mr. King's counsel was informed by Mrs. King's counsel that the trial had been set for October sixth.[34] Upon inquiry with the chancery clerk's office, however, Mr. King's counsel was informed that the case had not been set for that or any other date.[35] However, at some point after Mr. King's counsel spoke with the clerk's office, the trial date was indeed set for October sixth at the request of Mrs. King's counsel.[36] On October fifth, Mr. King's counsel was informed by opposing counsel's office that trial had been set for the next day, October sixth.[37] Mr. King's counsel was unable to contact opposing counsel or obtain a continuance from the court.[38] Mr. King was unable to appear on October sixth and a default judgment was entered against him.[39]

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testimony allowable in summary judgment hearing if it would ensure full and fair hearing of all pertinent evidence); Saddler v. Saddler, 556 So. 2d 344 (Miss. 1990) (Miss. R. Civ. P. 81(d)(5) requires issuance of summons commanding defendant to appear and defend at time and place at which motion is to be heard and failure to do so precludes summary judgment); Davis v. Davis, 558 So. 2d 814 (Miss. 1990)(to defeat motion for summary judgment, party must respond to motion with specific facts showing genuine issue of material fact exists).

[29] Martin v. City of Waynesboro, 559 So. 2d 1024 (Miss. 1990)(dismissal pursuant to Uniform Circuit Court Rule 4.03 for failure timely to prosecute an appeal is matter left to sound discretion of trial judge).

[30] Quick Change Oil & Lube Co., v. County Line Place, Inc., 571 So.2d 968 (Miss. 1990)(failure of party seeking voluntary dismissal to pay court costs may not be asserted by other party as denying effective dismissal merely for sole purpose of gaining tactical advantage); Carter v. Clegg, 557 So. 2d 1187 (Miss. 1990)(to oppose motion for voluntary dismissal pursuant to Miss. R. Civ. P. 41(b), defendant must demonstrate some legal prejudice other then mere tactical advantage for plaintiff).

[31] 556 So. 2d 716 (Miss. 1990)

[32] *Id.* at 717.

[33] *Id.* The tentative trial date set by the parties was later revoked by Mr. King. *Id.*

[34] *Id.*

[35] *Id.* at 717-18.

[36] *Id.* at 718.

[37] *Id.*

[38] *Id.*

[39] *Id.*

On appeal, Mr. King argued, among other issues, that the case was not triable on October sixth because there was no agreement between the parties as to a trial date nor was there a court order setting a date for trial.[40] The Mississippi Supreme Court reversed the default judgment.[41] The court held that failure to abide by the time requirements of Mississippi Rule of Civil Procedure 40(b)[42] resulted in the case not being triable on October sixth.[43] The court followed the balancing test of *H & W Transfer & Cartage Services, Inc. v. Griffin*, 511 So. 2d 895 (Miss. 1987), to test the merits of the Rule 60(b) motion.[44] Rule 40(b) requires a trial date to be set at least twenty (20) days before the date of trial, unless the parties agree to a shorter length.[45] As the case was not properly triable on October sixth, the court found that Mr. King had proper grounds to assert a motion for relief from judgment under Mississippi Rule of Civil Procedure 60(b).[46]

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[40] *Id.* Apparently, Mr. King did not specifically assert that Miss. R. Civ. P. 40(b) had not been followed, but the court noted that his assertion clearly indicated that he alleged a failure under the Rule. *King*, 556 So. 2d at 718.

[41] *King*, 556 So. 2d at 719.

[42] Mississippi Rule of Civil Procedure 40(b) states in part:

> The Court shall provide by written direction to the clerk when a trial docket will be set. The clerk shall at least five (5) days prior to the date on which the trial docket will be set notify all attorneys and parties without attorneys having cases upon the trial calendar of the time, place and date when said docket shall be set. All cases shall be set on the trial docket at least twenty (20) days before the date set for trial unless a shorter period is agreed upon by all parties or is available under Rule 55. The clerk shall within three (3) days after a case has been placed on the trial docket notify all parties who were not present personally or by their attorney of record at the docket setting as to their trial setting.

Miss. R. Civ. P. 40(b).

[43] *King*, 556 So. 2d at 719.

[44] *Id.* In *H & W Transfer*, the court stated that the factors to be considered are:

> (1) the nature and legitimacy of Defendant's reasons for his default, i.e., whether the Defendant has good cause for default,
>
> (2) whether Defendant in fact has a good cause for default,
>
> (3) the nature and extent of prejudice which may be suffered by the Plaintiff if the default judgment is set aside.

H & W Transfer, 511 So. 2d at 898.

The court noted that the relief sought by Mr. King was brought in the form of a Rule 60(b) motion for relief of judgment. *King*, 556 So. 2d at 719, n.2.

[45] *See supra*, note 37.

[46] *King*, 556 So. 2d at 719.

II. MISS. R. CIV. P. 12(b)

In *Young v. Huron Smith Oil Co.*,[47] the Mississippi Supreme Court reaffirmed its policy that failure to assert a Rule 12(b) defense in the answer, motion, or other preresponsive pleading constitutes waiver of that defense.[48] Huron Smith Oil Company (Huron) brought suit to recover on the personal guarantee of Mr. Robert E. Young, a resident citizen of Tennessee.[49] Huron had requested Mr. Young to come to Mississippi for negotiations on the matter.[50] However, after negotiations failed to produce a settlement, process was served upon Mr. Young in Mississippi.[51] Mr. Young answered the complaint without raising the defense of insufficiency of service of process.[52] Upon Huron's motion for summary judgment, Mr. young for the first time raised the issue of insufficient service of process, based on Mississippi Rule of Civil Procedure 12(b)(5).[53] Mr. Young claimed to have been lured into Mississippi from Tennessee under the guise of settlement negotiations when the actual purpose was for service of process.[54] He therefore contended that service of process was invalid as it had been obtained by fraud.[55] The circuit court denied this defense and granted Huron's motion for summary judgment.[56]

On appeal, Mr. Young again raised the defense that process had been obtained fraudulently and therefore service of process was insufficient.[57] The Mississippi Supreme Court affirmed the ruling of the circuit court as to the failure of the defense of insufficiency of process.[58]

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[47] 564 So. 2d 36 (Miss. 1990).

[48] *Huron Smith*, 564 So. 2d at 39. The court also addressed the matter of reasonableness of attorney's fees awarded in this action, citing Carter v. Clegg, 557 So. 2d 1187 (Miss. 1990) as support for the proposition that this is a matter submitted to the sound discretion of the trial judge. *Huron Smith*, 564 So. 2d at 40.

[49] *Huron Smith*, 564 So. 2d at 37.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 40.

[53] Mississippi Rule of Civil Procedure Rule 12(b) states:

> [e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter claim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .

MISS. R. CIV. P. 12(b)(5).

[54] *Huron Smith*, 564 So. 2d at 38.

[55] *Id.* at 37.

[56] *Id.* at 38.

[57] *Id.*

[58] *Id.* at 39.

The court did note that being lured into Mississippi for the purpose of service of process was indeed cause for invalidation of the service of process.[59] However, the court stated that the real issue on appeal was whether Mr. Young had timely raised his defense.[60] Under Mississippi Rule of Civil Procedure 12(h)(1), a defense of insufficiency of service of process is waived if the defense is not raised in an answer, motion, or other preresponsive pleading.[61] Since Mr. Young's answer made no mention of insufficiency of process, the court held that the defense was waived.[62]

III. MISS. R. CIV. P. 8(c)

In *Hertz Commercial Leasing Division v. Morrison*,[63] the court addressed the question of whether a defendant in a suit upon a commercial lease, who attempts to claim an acceleration clause is in the nature of the penalty, must claim such a defense affirmatively pursuant to the Mississippi Rule of Civil Procedure 8(c).[64] Valford Morrison (Morrison) negotiated a lease agreement for certain video monitoring security equipment with Stanco Communications Products, Inc. (Stanco).[65] Stanco then sold the lease to Hertz Corporation (Hertz).[66] The lease agreement provided that Hertz owned the equipment and leased it to Morrison for a term of five years.[67] Morrison gave Hertz a security deposit and agreed to pay Hertz a certain amount each month to cover rental charges.[68] Morrison became dissatisfied with the equipment and alleged that it had become inoperable.[69] Morrison stopped payments on the equipment and Hertz declared Morrison in default.[70] Upon default, Hertz sought to enforce an acceleration clause which provided them with the option to aggregate all unpaid lease payments for the entire five year term and to declare the payments immediately due and payable.[71] Hertz sued Morrison on the lease agreement and demanded accelerated aggregated rentals and reasonable attorney's fees.[72] Morrison made no charge that the acceleration clause constituted a penalty in his answer, nor did he assert any other reason in fact or in law why the clause might be unenforceable.[73] Upon Hertz's motion for summary judgment, the trial court granted Hertz partial summary judgment but construed the acceleration clause as providing a penalty.[74]

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[59] McClellan v. Rowell, 232 Miss. 561, 99 So. 2d 652 (1958).

[60] *Huron Smith*, 564 So. 2d at 38.

[61] *Id.* at 39. The court noted that it has consistently held failure to assert an affirmative defense constitutes waiver of that defense. *Id.* The holding in *Huron Smith* joins the list of cases holding this same principle. For a complete listing of these cases see *Huron Smith*, 564 So. 2d at 39.

[62] *Id.* at 39.

[63] 567 So. 2d 832 (Miss. 1990).

[64] *Hertz*, 567 So. 2d at 832. MISS. R. CIV. P. 8(c) states:

> Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been proper designation.

MISS. R. CIV. P. 8(c).

[65] *Hertz*, 567 So. 2d at 833.

[66] *Id.*

[67] *Id.*

On appeal, Hertz asserted that the trial court had no authority to consider the penalty theory because penalty is in the nature of the affirmative defense of "illegality" which Mississippi Rule of Civil Procedure 8(c) requires must be pled.[75] The Mississippi Supreme Court held that the defense of penalty is in the nature of an affirmative defense or avoidance within Mississippi Rule of Civil Procedure 8(c).[76] The penalty defense must be specifically pled.[77] Since, the penalty defense had not been specifically pled by Morrison, he could not avoid any claims asserted by Hertz on the basis of penalty.[78] However, the court was very clear in stating that it was not considering the question of whether an acceleration clause is indeed in the nature of a penalty.[79] The court simply stated that if a defendant wishes to raise the issue, then he must do so by pleading it affirmatively.[80]

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[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 834. The trial court had determined that the contract was a lease and not a contract for sale, relying upon Briscoe's Foodland, Inc. v. Capitol Assoc's, 502 So. 2d 619 (Miss. 1986). *Hertz*, 567 So. 2d at 834. The trial court then determined that the acceleration clause provided a penalty and therefore, Hertz was only entitled to recover those damages necessary to make Hertz whole. *Id.* at 834.

[75] *Hertz*, 567 So. 2d at 834.

[76] *Id.* at 836.

[77] *Id.*

[78] *Id.* at 837.

[79] *Id.* at 836, n.3.

[80] *Id.* at 836.

IV. Miss. Supreme Court Rules 4(b)

In the case of *Duncan v. St. Romain*[81] the Mississippi Supreme Court reaffirmed its adherence to the "hard steadfast rule" of applying a time limit of thirty (30) days for filing an appeal after entry of final judgment.[82] In this matter, Ms. Fannie Mae Duncan was represented by out-of-state counsel who had himself admitted pro hoc vice.[83] In this petition for rehearing he alleged that he had mistakenly relied upon Mississippi Code Annotated section 11-51-5 (1972) which had set the time period for appeal at forty-five (45) days.[84] As such, he contended that he should be granted an exception based on the fact that, as an out-of-state lawyer, who in good faith relied upon the Mississippi Code, he should be allowed to proceed with an appeal where the notice of appeal was filed within the forty-five (45) day period stated in the statute.[85]

However, the Mississippi Supreme Court stated that the rules governing perfection of appeal are those promulgated by the Mississippi Supreme Court.[86] Where the Mississippi Supreme Court Rules conflict with the Mississippi Code, the Supreme Court Rules will take precedence.[87]

Chris Deaton

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[81] 569 So. 2d 687 (Miss. 1990).

[82] *Duncan*, 569 So. 2d at 688.

[83] *Id.*

[84] *Id.*

[85] *Id.* The court noted that the out of state counsel had himself admitted pro hac vice upon the assertion that he was familiar with Mississippi law. *Id.* at 689. As such, the court reasoned that there was no reason to create a "good faith" exception for out of state counsel. *Id.*

[86] *Id.* at 688.

[87] *Id.* However, four justices dissented from this holding, writing three separate opinions on their reasons. *Id.* at 689-70.

CONTRACTS AND COMMERCIAL LAW

During 1990, the Mississippi Supreme Court decided eighteen cases involving contracts and commercial law. The court resolved disputes involving: release agreements,[1] recoveries pursuant to oral agreements,[2] non-performance defenses in breach of contract actions,[3] indemnity provisions,[4] arbitration agreements,[5] breach of implied warranties,[6] assignments and equitable mortgages,[7] validity of letters of credit,[8] application of the Parol Evidence Rule,[9] breach of employment agreements,[10] breach of fiduciary duties,[11] waiver of defenses,[12] the application of Article 9 of the Uniform Commercial Code to preexisting debt,[13] implied contracts,[14] recovery rights under indemnity agreements,[15] third party claims for breach of implied warranties,[16] the application of Article 2 of the Uniform Commercial Code to equipment lease/purchase agreements,[17] and the method applied when distinguishing per-unit and lump-sum contracts.[18]

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[1] McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033 (Miss. 1990) (relying on Pearce v. Pierce, 214 Miss. 344, 347, 58 So. 2d 824, 825 (1952), court held that when release is to be set aside for misrepresentation or fraud, it must be proved that fraud was related to past or existing facts).

[2] Williams v. Mason, 556 So. 2d 1045 (Miss. 1990) (when one has provided services for another in reasonable reliance upon promises to give consideration therefore, then upon the death of promisor, promisee may recover from the estate on quantum meruit basis).

[3] LeBleu v. Jim Murphy & Assocs., 557 So. 2d 526 (Miss. 1990) (party may not defend breach of contract action on grounds of non-performance when defending party has prevented performance by repudiating contract).

[4] Hopton Bldg. Maintenance v. United Parcel Service, 559 So. 2d 1012 (Miss. 1990) (legal liability is requisite for indemnity claims unless scope of liability is broadened by language in contract).

[5] Herrin v. Milton M. Stewart, Inc., 558 So. 2d 863 (Miss. 1990) (court may vacate arbitrator's award pursuant to MISS. CODE ANN. § 11-15-133 (1972) where evident partiality is present).

[6] May v. Ralph L. Dickerson Constr. Corp., 560 So. 2d 729 (Miss. 1990) (lack of privity is not valid defense to action by subsequent owners of building against general contractor for negligent construction of building).

[7] Gillis v. Case, No. 07-58805 (Miss. Dec. 27, 1990) (en banc) (mortgage differs from assignment in that mortgage creates lien in favor of mortgagee, but assignment passes whole interest in thing assigned).

[8] Hendry Const. Co. v. Bank of Hattiesburg, 562 So. 2d 100 (Miss. 1990) (where there is no direct promise by bank to pay addressee of letter, then there is no existence of valid letter of credit).

[9] McKee v. McKee, 568 So. 2d 262 (Miss. 1990). *See infra* notes 19-31 and accompanying text.

[10] Hoffman v. Trustees of E. Miss. Junior College, 567 So. 2d 838 (Miss. 1990) (court has duty of deference to hearing officials only if hearing officials' decision was supported by substantial evidence, was not arbitrary nor capricious, was not beyond power of hearing officials to make, and did not violate some statutory or constitutional right of complaining party).

[11] Butler v. Anderson, 568 So. 2d 296 (Miss. 1990) (suggesting that when defendant

I. CONTRACT INTERPRETATION: APPLICATION OF THE PAROL EVIDENCE RULE

In *McKee v. McKee*,[19] the Mississippi Supreme Court determined that when the traditional "four corners" rule and other traditional methods of contract construction do not aid the court, then the "totality of circumstances" may be considered to resolve contract issues.[20] John B. McKee, a farmer, deeded several parcels of farm land to his minor children, John, Jr., and Margaret, during the late 1940's.[21] Following the death of John B. McKee, Sr., and his wife; John, Jr., operated those properties and the estate properties as "J & M McKee," an

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breached fiduciary duty to keep proper books/records in accordance with Model Business Corporation Act, claimant may recover under doctrine of unjust enrichment).

[12] Austin Development Co. v. Bank of Meridian, 569 So. 2d 1209 (Miss. 1990) (where party has full knowledge of all defenses to note and executes new note payable at future date, he waives all defenses and becomes obligated to pay new note).

[13] Ford Motor Credit Co. v. State Bank & Trust Co., 571 So. 2d 937 (Miss. 1990). *See infra* notes 32-40 and accompanying text.

[14] Carmichael v. Agur Realty Co., 574 So. 2d 603 (Miss. 1990) (implied brokerage relationship can exist between broker/buyer if there exists loyalty along with reasonable expectation of compensation).

[15] Keys v. Rehabilitation Centers, Inc., 574 So. 2d 579 (Miss. 1990) (before indemnitee may recover, indemnitee must prove payment under compulsion along with reasonableness in amount).

[16] Employers Ins. of Wausau v. Mississippi State Highway Comm'n., No. 89-0667 (Miss. Dec. 19, 1990) (any third party claim for breach of implied warranty by building contractor must be premised on tort liability resulting from negligent specifications).

[17] Patel v. Telerent Leasing Corp., 574 So. 2d 3 (Miss. 1990). *See infra* notes 41-54 and accompanying text.

[18] Lamb Constr. Co. v. Town of Renova, 573 So. 2d 1378 (Miss. 1990) (court should construe contract most strongly against drafter when determining whether contract is per-unit or lump-sum contract).

[19] 568 So. 2d 262 (Miss. 1990).

[20] *McKee*, 568 So. at 266. The court maintained that one should look to the "four corners" of a contract to determine how to interpret it only when the intent of the parties is "clear and unambiguous." *Id.*; *see* Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 352 (Miss. 1990) (when substance of instrument is determined to be clear or unambiguous, parties' intent must be effectuated).

[21] *McKee*, 568 So. 2d at 263.

equal partnership with Margaret.[22] By 1982, the "J & M McKee" partnership owned real property, farm equipment and other assets in Mississippi, Arkansas, Florida, South Carolina and Paraguay, South America.[23] In mid-1982, serious disagreements arose between the partners.[24] By 1983, an agreement by written contract was reached as to the division of part of the properties.[25] In February, 1984, Margaret filed suit in the Chancery Court of Coahoma County, Mississippi for the dissolution of the partnership, an accounting, a division of assets and an injunction for division of the farm equipment.[26] After numerous hearings, the chancellor awarded Margaret 903 acres, John, Jr., 69.6 acres, and furthermore, refused Margaret's claim for the rental value of certain tractors used by John, Jr.[27]

Margaret contended that the chancellor erred by failing to interpret the parties' written agreement for division of the properties so as to include 973 acres in the "Klondike Place" and for failing to award her fair rental value for John, Jr.'s use of the tractor.[28] John, Jr., argued that the chancellor was correct in his decision.[29] The court first held that since John, Jr., had used the tractor to harvest joint crops, then Margaret was not harmed.[30] Second, the court found that the written contractual agreement of division between the parties was of no help in determining the parties' intent, thus, the "four corners" rule was impossible to apply, as were other traditional rules of contract construction.[31]

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[22] *Id.* John, Sr., died in 1966, and his wife, Frances McKee, died in 1970. *Id.* After his parent's death, John, Jr., actively directed the farming activities of the partnership, while Margaret lived and worked as a journalist in Memphis, Tennessee. *Id.* Margaret played no active role in the daily operations of the partnership, although she received regular funds and reports from the partnership. *Id.*

[23] *Id.*

[24] *Id.* The partners were in disagreement over the proper management of the partnership. *Id.* Furthermore, John, Jr., informed Margaret that the 1983 crop year would be the last year during which the properties would be operated as a partnership. *Id.*

[25] *Id.*

[26] *Id.* at 263-64. The main points of contention concerned the disposition of the "Klondike Place" which was to go to Margaret and the "Taylor Gin" which was to go to John, Jr. *Id.* at 264. Margaret contended that the "Klondike Place" should contain 973 acres. *Id.* John, Jr., contended that he should receive 60 acres known as the "Chism Property" from the same "Klondike Place" parcel, and 9.6 acres known as the "Compress Site" used in conjunction with the "Taylor Gin," thus leaving Margaret with 903 acres in the "Klondike Place." *Id.*

[27] *Id.* at 265. At first, the chancellor issued an injunction prohibiting John, Jr., from using two tractors until they were appraised. *Id.* After appraisal, John, Jr., used the tractors to farm partnership crops. *Id.* at 265.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 267. The court noted that the chancellor's injunction prohibited John, Jr., from using the tractor before it was appraised and that his use occurred after the appraisal. *Id.*

II. APPLICATION OF ARTICLE 9 OF UNIFORM COMMERCIAL CODE TO PRE-EXISTING DEBT

In *Ford Motor Credit Co. v. State Bank & Trust Co.*,[32] Ford Motor Credit Company (Ford) had two floor plan arrangements with Buffington Ford, Inc. (Buffington).[33] However, it was stipulated that Ford did not floor plan any of the vehicles involved in this action.[34] Rather, First State Bank and Trust financed the purchase of these vehicles.[35] Subsequently, Buffington was unable to fulfill certain obligations, thereby, forcing Ford to repossess all of the vehicles it had floor planned.[36] Furthermore, Ford brought a replevin action to recover the used vehicles that it had not floor planned with Buffington.[37] The lower court dismissed with prejudice Ford's replevin action, holding that Ford's security interest never attached to the used vehicles because there was no value given nor was there an agreement between the parties that a security interest attach.[38]

The Mississippi Supreme Court held that Ford had an attached and perfected security interest in the used vehicles.[39] The court reasoned that just because Ford had not provided Buffington with money to purchase the used vehicles did not mean that Ford Motor Credit Company had not given value.[40]

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[31] *Id.* at 266. The court noted that from beginning to end, the parties seemed to propose that Margaret end up with 3,720 acres and John, Jr., with 3,680 acres. *Id.* This division of property was consistent throughout all their correspondence, and thus, considering the totality of the circumstances, the court found that Margaret should have been awarded the 60 acre "Chism Property" as part of the "Klondike Place." *Id.* at 266-67. Furthermore, the court found that the chancellor had acted within his discretion in awarding the 9.6 acres in conjunction with the "Taylor Gin" to John, Jr. *Id.* at 267.

[32] 571 So. 2d 937 (Miss. 1990).

[33] *Ford Motor Credit Co.*, 571 So. 2d at 938. Buffington Ford, Inc., was an auto dealership in Collins, Mississippi. *Id.* One of the Ford Motor Credit Company's floor plan arrangements with Buffington Ford, Inc. was dated September 21, 1976, and the other August 9, 1984. *Id.*

[34] *Id.* All of the vehicles involved in this action were used. *Id.*

[35] *Id.* First State Bank & Trust attempted to perfect its security interest by noting a lien on the certificates of title, but it never filed a financing statement. *Id.*

[36] *Id.* at 939.

[37] *Id.* Ford sought Buffington's used vehicles that it did not floor plan but Buffington had already disbursed the used vehicles to various locations, including Carroll Fairchild's Used Cars in Collins, Mississippi. *Id.*

[38] *Id.* The lower court held that First State Bank & Trust had the only attached security interest in the used vehicles. *Id.* Ford appealed the lower court's decision to the Mississippi Supreme Court. *Id.*

[39] *Id.* at 940. The court reasoned that Ford entered into a security agreement with

III. APPLICATION OF ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE TO EQUIPMENT LEASE/PURCHASE AGREEMENTS

In *Patel v. Telerent Leasing Corp.*,[41] J.C. Patel, doing business as Soyna Motor Inn, entered into a lease/purchase agreement with Telerent Leasing Corp. (Telerent), for thirty General Electric brand television sets.[42] Later additions to the contract obligated Telerent, at an increased cost to Patel, to install theft alarms and to carry insurance on the television sets.[43] On June 20, 1985, Patel acknowledged the installation of all the television sets and, on October 15, 1985, installation of the distribution and alarm systems.[44] Telerent billed Patel for

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Buffington when it discovered that it sold vehicles "out of trust." *Id.* at 939. Ford and Buffington entered into the security agreement so that Buffington could remain in business and repay the money it owed Ford. *Id.* The court further reasoned that Ford's forbearance fell squarely within the broad definition of "value" provided in MISS. CODE ANN. § 75-1-201(44)(Supp. 1990). *Ford Motor Credit Co.*, 571 So. 2d at 940. Specifically, MISS. CODE ANN. § 75-1-201(44) (Supp. 1990) defines "value" as "security for or in total or partial satisfaction of a pre-existing claim" or "any consideration sufficient to support a simple contract." A security interest attaches when: (1) there is an agreement; (2) value is given; and (3) the debtor has rights in the collateral. MISS. CODE ANN. § 75-9-203 (Supp. 1990).

[40] *Ford Motor Credit Co.*, 571 So. 2d at 939. The court, relying on Peoples Bank & Trust Co. v. Comfort Eng'g. Co., 408 So. 2d 1190 (Miss. 1982), recognized that a security interest may be given for a pre-existing debt. *Ford Mortor Credit Co.*, 571 So. 2d at 939. The court noted that, "several parties have argued that a creditor does not give value if he takes his security interest to secure a pre-existing claim against the debtor. The courts have tossed these parties out on their ears, as well they ought." *Peoples Bank & Trust Co.*, 408 So. 2d at 1194 (quoting J. WHITE & R. SUMNERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 23-4, at 792 (1972)).

[41] 574 So. 2d 3 (Miss. 1990).

[42] *Patel*, 574 So. 2d at 4. Telerent Leasing Corp., a Delaware corporation, has its principal offices in Raleigh, North Carolina. *Id.* The lease purchase agreement between these two parties was entered into on April 25, 1985. *Id.* The agreement also obligated Telerent to make certain changes to the antenna distribution system in all 50 rooms of the motel. *Id.* Furthermore, the lease agreement obligated Telerent to replace or repair television sets stolen or damaged, provided Patel promptly reported the loss to the law enforcement authorities and Telerent. *Id.*

[43] *Id.* Lease Addendum III dated August 3, 1985, obligated Telerent to install a theft alarm in the 50 motel rooms, and increased the rent by $27.39 a month. *Id.* Lease Addendum IV dated September 13, 1985, obligated Telerent to provide insurance for all the television receivers. *Id.*

[44] *Id.* On June 20, 1985, Patel signed a completion certificate acknowledging that he

the television sets from June 22, 1985, but acknowledged no payments were due on the distribution system and alarms until October 15, 1985.[45] Patel refused to make any payments prior to October 15, 1985, asserting that the television sets were unusable prior to that time due to the inadequacy of the distribution system.[46] Telerent instituted a successful replevin action in the County Court for the First Judicial District of Hinds County.[47] After selling the repossessed equipment, Telerent sued Patel for $24,445.44, net damages.[48] The county court held that Patel had properly and timely rejected the contract with Telerent.[49] Telerent appealed to the Circuit Court for the First Judicial District of Hinds County, where the circuit judge found that Patel had accepted the television sets on June 22, 1985, and further that he had failed to make a proper rejection.[50]

The Mississippi Supreme Court addressed the applicability of Article 2 of the Uniform Commercial Code to this particular lease/purchase agreement.[51] The court held that this "lease" contract was, in

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had received and accepted delivery of 30 television sets and that "the installation [was] completed to our satisfaction." *Id.* On October 15, 1985, Patel signed another completion certificate acknowledging receipt and installation of 30 pedestals, 50 taps and 50 theft alarms. *Id.*

[45] *Id.*

[46] *Id.* at 5. Patel had notified Telerent, in writing on July 10, September 22, and October 20, 1985, that the television sets were unusable prior to October 15, 1985, due to the inadequacy of the distribution system. *Id.* at 4-5. Apparently, the letters also informed Telerent that Patel had lost five color televisions which should have been replaced by Telerent Leasing immediately. *Id.* at 5.

[47] *Id.* at 5. Telerent received a judgment giving the company possession of 22 color television sets with radio, 22 locking floor pedestals, and the theft alarm systems. *Id.* Telerent sold the repossessed equipment at a public sale at which it was the only bidder, bidding $110 per set plus $500 for the theft alarm system, totaling $2,920. *Id.*

[48] *Id.* On July 7, 1986, Telerent filed this complaint against Patel alleging $24,445.44 in damages. *Id.* The damages were arrived at by totaling the sum due under the lease agreement of $23,617.44 plus reasonable expenses in repossessing and selling the property, including attorney's fees of $3,748.00 for a total of $27,365.44. *Id.* From the total damages of $27,365.44, $2,920 was deducted, leaving the net damages of $24,445.44. *Id.*

[49] *Id.* A judgment was entered December 22, 1986, finding that Patel had properly and timely rejected the contract with Telerent and that Telerent had failed to give proper notice. *Id.*

[50] *Id.* The circuit judge found that Patel, under N.C. GEN. STAT. § 25-2-606 (1986), had accepted the television sets by execution of the completion certificate on June 22, 1985, and by engraving the name "Soyna Motor Inn" onto each of the leased sets. *Patel*, 574 So. 2d at 6. Further, the circuit court judge found that Patel had failed to effectuate a proper rejection as set forth under N.C. GEN. STAT. § 25-2-602 (1986). *Patel*, 574 So. 2d at 6.

[51] *Patel*, 574 So. 2d at 6. The court reasoned that the decision to apply the provisions of the Uniform Commercial Code to a lease/purchase agreement depends on

fact, a sales contract, and that the provisions of Article 2 of the Uniform Commercial Code applied.[52] The court found that Telerent breached its agreement because of its failure to complete the installation prior to October 15, 1985.[53] Therefore, the court concluded, relying on U.C.C. section 2-717, that Patel was entitled to deduct from the sales price any damages resulting from breach by the seller even though he used the defective goods.[54]

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whether the lease is the functional equivalent of a sale. *Id.*

[52] *Id.* The court reasoned that the terms of the lease, including the nominal purchase price of one dollar per television set at the expiration of the term, was evidence of a sale, sufficient to warrant application of the provisions of Article 2 of the Uniform Commercial Code. *Id.*

[53] *Id.* The court reasoned that the letters from Patel, and the concession Telerent made by its letter of November 11, 1985, supported the conclusion that the system installed by Telerent was incomplete and was not working satisfactorily prior to October 15, 1985. *Id.*

[54] *Id.* The court relying on MISS. CODE ANN. § 75-2-717 (1972), concluded that Telerent's failure to properly install the equipment was a material breach of contract, the remedy for which gave Patel the right to withhold payment. *Patel*, 574 So. 2d at 6. Specifically, MISS. CODE ANN. § 75-2-717 (1972) states: "The buyer on notifying the seller of his intention to do so may deduct all or any part of the damages resulting from any breach of the contract from any part of the price still due under the same contract." Furthermore, the court noted that the principle of law codified by MISS. CODE ANN. § 75-2-717 (1972) offset provision was consistent with pre-U.C.C. contract law and thus, pre-U.C.C. laws are still applicable unless displaced by particular provisions of the Mississippi Code. *Patel*, 574 So. 2d at 7.

CRIMINAL LAW

INTRODUCTION

In 1990, the Mississippi Supreme Court rendered decisions in criminal cases in the following areas: constitutional law,[1] indictments,[2] discovery/pre-trial statements,[3] judge disqualification,[4] miscellaneous procedural issues,[5] evidence,[6] insanity/competency,[7] jury instructions,[8] jury verdicts,[9] sentencing,[10] specific offenses and statutes,[11] prosecutorial misconduct,[12] post-conviction relief,[13] and indigents.[14]

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[1] *See infra* notes 15-82 and accompanying text.

[2] *See infra* notes 83-94 and accompanying text.

[3] Hunt v. State, 569 So. 2d 1200 (Miss. 1990) (where written statements of witnesses were never seen by circuit judge nor defense counsel, it was incumbent upon circuit judge to require state to produce statements for judge's inspection to determine if statements contained exculpatory material); Welch v. State, 566 So. 2d 680 (Miss. 1990) (witness' statements which may be exculpatory should have been turned over to defense counsel during discovery and determination of statement's worth to defendant could not fairly be decided by prosecution); Porter v. State, 564 So. 2d 31 (Miss. 1990) (court determined no violation where defense counsel was afforded opportunity to view undisclosed statements prior to cross examination and was allowed to make record showing statements as exculpatory); *cf.* Carraway v. State, 562 So. 2d 1199 (Miss. 1990) (where State objects to testimony because defense had not disclosed evidence prior, then trial court should give State reasonable opportunity to become familiar with undisclosed evidence).

[4] *See infra* notes 95-101 and accompanying text.

[5] Calberson v. State, No. 03-0009 (Miss. July 25, 1990) (defense counsel has right to present to jury details of plea bargain made with accomplice, but must raise issue at trial); Simmons v. State, 568 So. 2d 1192 (Miss. 1990) (trial court acquiring jurisdiction first in concurrent jurisdiction posture may voluntarily relinquish jurisdiction without prejudice to State, permitting another court of concurrent jurisdiction to proceed with prosecution); Myers v. State, 565 So. 2d 554 (Miss. 1990) (when a juror fails on voir dire to give substantial material information when asked clearly worded question, and when objective rational relationship of information withheld and issues at trial are such that potential for prejudice occurs; then removal of juror after trial has begun is within the scope of the circuit court's authority); Caldwell v. State, 564 So.2d 1371 (Miss. 1990) (where defendant's guilty plea did not occur within six months prior to March 31, 1983, as required by MISS. CODE ANN. § 99-2-1371 (Miss. 1990) court was not authorized to expunge defendant's criminal record); Gaston v. State, 562 So. 2d 61 (Miss. 1990) (trial court may grant new trial upon discovery of new evidence, but not where reasonable diligence of counsel would have discovered evidence sooner); Estelle v. State, 558 So. 2d 843 (Miss. 1990) (court held defendant's request during trial to dismiss his counsel was untimely); Avery v. State, 555 So. 2d 1039 (Miss. 1990) (preliminary hearing expanded to include important right of production of witnesses and cross examination of those witnesses).

[6] *See infra* notes 102-131 and accompanying text.

[7] Roundtree v. State, 568 So. 2d 1173 (Miss. 1990) (expert may not testify as to

CONSTITUTIONAL LAW

A. Fourth Amendment

The Mississippi Supreme Court decided several cases in 1990 which dealt primarily with the following search and seizure issues: standing,[15] search incident to an arrest,[16] undercover purchase of an

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whether M'Naughten test was met since such opinion invades province of jury and asks for legal conclusion); Hendrix v. Gammage, 556 So. 2d 354 (Miss. 1990) (failure to comply with Mississippi Uniform Criminal Rules of Circuit Court Practice Rule 4.08 which mandates hearing on mental capacity of defendant committed to state mental institution when state asylum officials file written notification that defendant is mentally competent to stand trial is reversible error).

[8] *See infra* notes 144-163 and accompanying text.

[9] Kirkland v. State, 573 So. 2d 681, 683 (Miss. 1990) (court reversed and remanded manslaughter conviction where reasonable juror could not have convicted under facts of case).

[10] *See infra* notes 164-192 and accompanying text.

[11] *See infra* notes 193-213 and accompanying text.

[12] White v. State, 566 So. 2d 1256, 1259-60 (Miss. 1990) (MISS. UNIF. R. CIR. CT. PRAC. 4.06 and 4.07 (1990) do not require prosecution to provide notice of names of rebuttal witnesses unless related to defendant's alibi, and evidence must show facts specific enough to warrant finding of improper sequestration of jury); Cochrell v. State, 566 So. 2d 1243, 1245 (Miss. 1990) (where defendant is confronted at trial by evidence not properly produced in discovery, defendant must request continuance or mistrial pursuant to MISS. UNIF. R. CIR. CT. PRAC. 4.06(i)(2) (1990) or be procedurally precluded from complaining of discovery violation); Doby v. State, 557 So. 2d 533, 537-40 (Miss. 1990) (prosecutorial comments concerning defendant's failure to subpoena confidential informant do not constitute reversible error where defense previously "opened the door" by questioning witness about confidential informant); Griffen v. State, 557 So. 2d 542, 551-54 (Miss. 1990) (any comment by prosecution which could reasonably be construed by jury as comment on defendant's failure to testify requires reversal in that defendant is not afforded fundamentally fair trial, even when contemporaneous objection is lacking).

[13] *See infra* notes 214-28 and accompanying text.

[14] Pruett v. State, 574 So. 2d 1342, 1342 (Miss. 1990) (one thousand dollar limitation required by MISS. CODE ANN. § 99-15-17 (Supp. 1990), for counsel involved in capital cases is not unconstitutional); Fielder v. State, 569 So. 2d 1170, 1173 (Miss. 1990) (trial court commits reversible error when it denies indigent defendant's request for transcript of earlier mistrial and no adequate alternatives exist to assure that defendant receives fair trial).

[15] *See infra* notes 20-25 and accompanying text.

[16] Ellis v. State, 573 So. 2d 724, 726 (Miss. 1990) (court held that where police officer has probable cause to arrest at time officer approaches suspect, officer is justified in frisking suspect not only for weapons, but also for evidence).

illegal substance,[17] the effect of an illegal search yielding no incriminating evidence,[18] and the sufficiency of the description of the premises to be searched.[19]

The court addressed a criminal defendant's standing to object to a search under the fourth amendment in *White v. State*.[20] In *White*, the search yielding incriminating evidence of a burglary occurred at the home of a friend of the defendant.[21] The search took place after the defendant was in police custody.[22] There was some question surrounding consent of the defendant's friend to the search; however, the court held the evidence admissible even assuming the search was illegal.[23] The Mississippi Supreme Court agreed with the trial court's statement of the law,[24] and held that the defendant had no reasonable expectation of privacy in the premises and thus had no standing to object to an illegal search thereof.[25]

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[17] Bradley v. State, 562 So. 2d 1276, 1278-79 (Miss. 1990) (court held that purchase of cocaine by undercover agent without search warrant was not illegal search and seizure).

[18] Young v. State, 562 So. 2d 90, 91 (1990)(court held that even unlawful search of suspect will not constitute reversible error where no incriminating evidence is found by search).

[19] Hamilton v. State, 556 So. 2d 685, 690 (Miss. 1990) (court held that where affidavit and description of underlying facts and circumstances are attached to search warrant and incorporated into it by reference, insufficient description of place to be searched in warrant itself may be cured if attached documents sufficiently direct officers to place where warrant is to be executed).

[20] 571 So. 2d 956 (Miss. 1990).

[21] *White*, 571 So. 2d at 956. On July 20, 1985, police officers went to the one-room apartment of Ms. Dorothy Quarles to arrest Danny White on a contempt charge. *Id.* The officers found White in the apartment and asked him to accompany them to the police station. *Id.* During a search of White, the officers found a watch and a pair of socks meeting the description of articles previously reported stolen. *Id.* The police then obtained a search warrant and returned to Ms. Quarles' apartment. *Id.* Although Quarles informed the officers that everything White had there was in one particular drawer of the dresser, the officers found in open view on top of the dresser, among other things, a diamond ring and gold chain identified as stolen property. *Id.*

[22] *Id.* at 958. The court stated that it was reasonably arguable that the search of Quarles' apartment was not entirely consensual but was merely an "acquiescence upon the claim of authority being asserted by the police." *Id.* Additionally, there was some question regarding the validity of the warrant. *Id.* Thus, for purposes of this decision, the court regarded the search of Quarles' apartment as illegal. *Id.*

[23] *Id.* at 958-59.

[24] *Id.* The court relied on Brown v. State, 358 So. 2d 1004 (Miss. 1978), where the Mississippi Supreme Court held that where consent to a search is voluntarily given by some third party who possesses "common authority, mutual use and joint control over property not in the exclusive control or possession of the defendant" and where the defendant had no "reasonable expectation of privacy," such search was lawful. *Brown*, 358 So. 2d at 1005. In *Brown*, a search of the defendant's mother's house was lawfully conducted pursuant to the mother's consent. *Id.* at 1004-05.

B. Fifth Amendment

During 1990, the Mississippi Supreme Court rendered three decisions involving claims of double jeopardy.[26] In addition, the court decided several cases regarding voluntary confessions,[27] waiver of the right to counsel during an interrogation,[28] and the admission of a confession obtained after the interrogating officer hears the suspect request an attorney during a magistrate hearing.[29]

In *State v. Danley*,[30] the Mississippi Supreme Court examined the State's ability to re-prosecute after a reversal on procedural grounds where the defendant voluntarily breached a plea bargain agreement.[31] In *Danley*, the defendant, Bernard Douglas Danley, was a suspect for the murder of William Platt.[32] In exchange for assistance in locating the body, the district attorney agreed to allow Danley to plead guilty to two lesser offenses.[33] Danley revealed the location of Platt's body and provided other details of the crime; however, the district attorney, thinking that Danley had not been completely truthful, unilaterally terminated the plea bargain and indicted Danley for Platt's murder.[34] A jury convicted Danley for the murder and sentenced him to life imprisonment;[35] however, the Mississippi Supreme Court reversed and remanded the case,[36] holding that the district attorney could not unilaterally make such a finding of fact.[37]

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[25] *White*, 571 So. 2d at 958-59. The court expressly overruled two contradictory Mississippi cases, to the extent each was inconsistent with this opinion. *Id.* at 960 (overruling Canning v. State, 226 So. 2d 747 (Miss. 1969) and Fuller v. State, 230 So. 2d 213 (Miss. 1970)). The court reasoned that since federal law controls application of the fourth amendment of the United States Constitution, then the decision in *Rakas v. Illinois*, 439 U.S. 128 (1978) was controlling on the standing issue. *White*, 511 So. 2d at 959-60.

[26] State v. Danley, 573 So. 2d 691 (Miss. 1990) (discussed textually). Harrelson v. State, 569 So. 2d 295, 296-97 (Miss. 1990) (court held that where essential element of offense charged constitutes offense for which defendant has already been prosecuted, such case is barred by double jeopardy provision of the United States and Mississippi Constitutions); Spann v. State, 557 So. 2d 530, 532 (Miss. 1990) (where trial judge's declaration of mistrial is "manifest necessity" and there is no abuse of discretion, then defendant may be tried again on same charge without violating double jeopardy).

[27] Smith v. State, 569 So. 2d 1203, 1204 (Miss. 1990) (in determining whether intoxicated defendant's waiver of right to counsel is voluntary, trial court must consider totality of circumstances, including defendant's degree of intoxication).

[28] Fowler v. State, 566 So. 2d 1194, 1197 (Miss. 1990) (declining to sign written waiver of rights without attorney present after *Miranda* warnings have been given may indicate understanding by defendant that anything said may be used against him and is legally adequate for trial court to regard any statement as voluntary, knowing, and intelligently made); Saucier v. State, 562 So. 2d 1238, 1244 (Miss. 1990) (upon knowing, voluntary, and intelligent waiver of right to counsel, any subsequent confession by defendant is admissible in evidence).

[29] Kirkland v. State, 559 So. 2d 1046, 1048 (Miss. 1990) (where police officer hears accused request attorney during magistrate hearing, any subsequent interrogation results are inadmissible, absent voluntary and knowing waiver by accused of right to remain silent and right to counsel).

[30] 573 So. 2d 691 (Miss. 1990).

[31] *Danley*, 573 So. 2d at 692.

On remand, Danley refused to plead guilty to the lesser offenses;[38] and, because the evidence was insufficient to try him for those offenses, the trial court discharged Danley "of any and all crimes,"[39] reasoning that a retrial on the murder charge would constitute a violation of double jeopardy.[40]

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[32] *Id.* In 1985, the family of the victim, William Platt, notified the George County sheriff's office that Platt had not returned to Alabama from a trip to Lucedale, Mississippi, to meet with Danley. *Id.* After being unable to locate Platt, the sheriff's department concluded that Platt had been the victim of foul play and, thus, engaged Danley's assistance in locating Platt's body and/or the culprit[s]. *Id.*

[33] *Id.* In exchange for Danley's cooperation, the district attorney agreed to allow him to plead guilty to accessory after the fact of murder and conspiracy to distribute a controlled substance. *Id.* Additionally, the district attorney agreed to recommend a five-year sentence for the first offense and five to ten years for the second, both sentences to run consecutively. *Id.*

[34] *Id.*

[35] *Id.* Danley appealed his conviction and presented the issue of whether the district attorney had the authority to void the plea bargain after unilaterally concluding that Danley had not been completely truthful in providing details of the crime. *Id.*

[36] *Id.* at 692-93; *see* Danley v. State, 540 So. 2d 619 (Miss. 1989) (hereinafter *Danley I*) (reversal of Danley's conviction for murder).

[37] *Danley*, 573 So. 2d at 692. On appeal from Danley's murder conviction, the Mississippi Supreme Court held: "(1) that a DA may not unilaterally make such a fact-finding (*i.e.*, that Danley breached the bargain by allegedly lying); (2) that only a trial court may, upon completion of an evidentiary hearing, determine whether the bargain had been breached; (3) that no evidentiary hearing had been held in Danley's case; and (4) that, therefore, the trial court is reversed on procedural grounds, the murder conviction set aside, and the case remanded for 'further disposition'." *Id.* at 692-93 (citing *Danley I*, 540 So. 2d at 623). The court explained "further disposition" to mean that Danley should have been allowed to reenter a guilty plea pursuant to the terms of the bargain upon which he had relied. *Id.* at 693.

[38] *Id.* At a hearing in July 1989, Danley surprisingly announced that he would not plead guilty to the lesser offenses, thereby refusing to comply with the terms of the bargain. *Id.*

[39] *Id.* The trial court concluded there was no remedy for the State and that Danley should be discharged as a " free man." *Id.*

On appeal, the Mississippi Supreme Court held that re-prosecution of Danley would not constitute double jeopardy.[41] The court stated that the double jeopardy clause does not preclude re-prosecution where a criminal conviction is reversed on grounds other than the sufficiency of evidence.[42] Furthermore, Danley's voluntary breach of the plea bargain resulted in the bargain's termination and the State's retention of its power to prosecute.[43] Therefore, since Danley's original murder conviction was reversed on procedural grounds[44] and he subsequently voluntarily breached the plea bargain, the court held that the district attorney was free to re-prosecute Danley under the original indictment for murder.[45]

C. Sixth Amendment

The Mississippi Supreme Court decided a number of cases during 1990 concerning the following sixth amendment issues: the right to a speedy trial,[46] the right to confrontation of witnesses,[47] the right to counsel,[48] and the right to effective assistance of counsel.[49]

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[40] *Id.* The trial court stated: "[H]aving [once] been tried before a jury, convicted, and reversed by the Supreme Court [sic], rehearing denied, this matter is finalized and you are discharged as a murderer. You [Danley] cannot be retried; double jeopardy applies to that situation." *Id.*

[41] *Id.* at 695.

[42] *Id.* at 694 (citing United States v. Ball, 163 U.S. 662 (1896)).

[43] *Id.* The court noted that had Danley on remand pled guilty to the lesser offenses, the district attorney would have had the option of requesting an evidentiary hearing to determine whether the bargain had been breached by Danley's alleged untruthfulness. *Id.* at 694 n.2. A determination that Danley had in fact lied would have likewise resulted in the bargain's termination. *Id.*

[44] *Id.* at 693-94. The court stated that the court's reversal of the murder conviction in *Danley I* constituted neither a rendering of the case nor a discharge of Danley. *Id.* at 694.

[45] *Id.* at 695. Another key authority in the court's decision was the case of *Ricketts v. Adamson*, 483 U.S. 1 (1987), in which the United States Supreme Court held that the double jeopardy clause would not protect a defendant who seeks to benefit from the consequences of a voluntary breach of a plea bargain. *Danley*, 573 So. 2d at 694 (citing *Ricketts*, 483 U.S. 10-12).

[46] Handley v. State, No. 07-58858 (Miss. Dec. 27, 1990) (discussed textually); Flores v. State, No. 07-58937, slip op. at 11-12 (Miss. Dec. 19, 1990) (where more than 270 days have elapsed between time of arraignment and time of trial, and defendant did not cause delay and State does not show good cause for delay, defendant's right to speedy trial may have been infringed); Galloway v. State, No. 89-0918, slip op. at 3 (Miss. Dec. 19, 1990) (where trial is held within 270 days from time of arraignment after re-indictment for same offense, mandates of MISS. CODE ANN. § 99-17-1 (Supp. 1990), 270-day rule, are satisfied); Jaco v. State, No. 89-0557, slip op. at 13 (Miss. Dec. 19, 1990) (for constitutional purposes, although delays of over 270 days are presumptively prejudicial, if no

In the cases involving right to speedy trial the court discussed the statutory right to a speedy trial located at Mississippi Code Annotated section 99-17-1 (Supp. 1990).[50] The court distinguished between the constitutional and statutory requirements for a speedy trial and articulated the proper analysis of each in *Handley v. State*.[51] The court stated exactly when the right attaches for both constitutional and statutory purposes.[52] The court concluded that for constitutional purposes, the right to a speedy trial attaches upon arrest.[53] The statutory right, often referred to as the 270 day rule, attaches upon arraignment[54] and is satisfied once the trial begins, regardless of a mistrial.[55] In addition,

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substantive prejudice results, then there is no deprivation of right to speedy trial); Yarber v. State, 573 So. 2d 727 (Miss. 1990) (although docket congestion is "good cause" for delay of statutory right to speedy trial, "mass continuance" evidenced by notations routinely made in minute book at end of each court term is insufficient to show good cause and toll 270 day period absent specific state request for continuance); Barnes v. State, No. 89-0552, slip op. at 7 (Miss. Dec. 12, 1990) (right to speedy trial is fundamental and may be raised initially on appeal); Moore v. State, 556 So. 2d 1031, 1033 (Miss. 1990) (when trial occurs 341 days after arraignment and there appears to be no justification for delay, defendant's right to be tried within 270 days of arraignment under MISS. CODE ANN. § 99-17-1 (Supp. 1990) is violated).

[47] Samuels v. State, 567 So. 2d 843, 846 (Miss. 1990) (where defendant executes recognizance bond and then voluntarily leaves courthouse on day of trial, defendant has waived the right to be present at trial).

[48] Wilson v. State, No. 89-0301, slip op. at 2 (Miss. Dec. 19, 1990) (only actual confrontation with accused at police lineup is critical stage which requires right to counsel; presence of defense counsel is not required during post-viewing confrontation between witness and police); Riley v. State, 562 So. 2d 1206, 1209 (Miss. 1990) (there is no per se right to counsel in probation revocation proceeding).

[49] *See infra* notes 63-74 and accompanying text.

[50] MISS. CODE ANN. § 99-17-1 (Supp. 1990) states: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."

[51] No. 07-58858 (Miss. Dec. 27, 1990).

[52] *Handley*, No. 07-58858, slip op. at 4. The court stated that the determination of whether the right to a speedy trial has been satisfied begins with a calculation of the lapse of time. *Id.* As such, it is necessary to distinguish between when the right attaches for both constitutional and statutory purposes. *Id.*

[53] *Id.* (citing Smith v. Smith, 550 So. 2d 406, 408 (Miss. 1989)). The court then stated that once the constitutional right attaches, there must be an analysis of the facts of the case in light of the factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). *Handley*, No. 07-58858, slip op. at 4.

[54] *Handley*, No. 07-58858, slip op. at 5.

[55] *Id.* The court pointed out that calculating the statutory time limit requires exclusion of the date of arraignment and inclusion of the trial date and weekends, unless the last day falls on Sunday. *Id.*

the court noted that any delay attributable to the defendant and any continuance for "good cause" will toll the running of the time.[56]

The court then articulated the applicable analysis for determining whether a particular defendant has been denied the right to a speedy trial.[57] There must first be a calculation of three time periods: (1) the time between the arrest and the trial for constitutional purposes; (2) the time between the arraignment and the trial for statutory purposes; and (3) the time between any mistrial and the subsequent trial for constitutional purposes.[58] The second part of the court's analysis was a consideration of the factors previously set forth by the United States Supreme Court,[59] which include: the length of delay, the reason for delay, the defendant's timely assertion of his right to a speedy trial, and the resulting prejudice to the defendant.[60] Finally, the court stated, relying on *Barker*, that it must weigh each of those factors in light of the particular facts of the case.[61]

Applying the foregoing analysis, the court determined that neither the defendant's statutory nor his constitutional right to a speedy trial had been violated.[62]

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[56] *Id.* In addition, where the record is silent as to the reason for the delay, the time runs against the State rather than the defendant. *Id.*

[57] *Id.* The functional analysis set out by the court involves a three-step process which incorporates both the constitutional and statutory speedy trial requirements. *Id.*

[58] *Id.* at 6. The court listed the three periods for calculation and then set out a chronology of events concerning the instant case for both constitutional and statutory purposes. *Id.* at 6-7.

[59] Barker v. Wingo, 407 U.S. 514 (1972).

[60] *Handley*, No. 07-58858, slip op. at 5 (citing *Barker*, 407 U.S. at 521).

[61] *Id.*

[62] *Id.* at 10, 12. The court calculated the total number of days in the instant case at 603 days for constitutional purposes and 384 days for statutory purposes. *Id.* at 7. Subtracting the time that enured to Handley's benefit, 200 days, the delay between arrest and trial became 403 days for constitutional purposes, and the time between arraignment and trial became 184 days for statutory purposes. *Id.* The court thus determined that Handley's statutory right to be tried within 270 days had not been violated and proceeded with the *Barker* analysis for constitutional purposes. *Id.*

Looking at the first factor, length of delay, the court held that although twenty months is a substantial period and "presumptively prejudicial," that factor alone is insufficient for reversal. *Id.* at 8. The court next addressed the reasons for the 603 day delay. Where the record showed no reason for delay, the time elapsed was counted against the State. *Id.* at 8-9. The court then stated that a 78-day delay between arraignment and the first scheduled trial was not unreasonable under the circumstances. *Id.* at 9. Finally, the period of time which Handley himself caused by jumping bond and failing to appear at the originally scheduled trial, a total of 200 days, was counted against Handley. *Id.* The court stated that Handley asserted his right to a speedy trial 35 days prior to his first actual trial. *Id.* Handley asserted several instances of prejudice, including

Regarding the issue of representation of a criminal defendant, the Mississippi Supreme Court decided a number of cases during 1990 addressing the right to effective assistance of counsel.[63] Impermissible conflicts of interest arising out of representation of co-defendants was the subject of *Armstrong v. State*.[64] In *Armstrong*, fourteen-year old Willie Armstrong and seventeen-year old Linzie Madkins were jointly indicted for armed robbery.[65] The circuit court appointed one public defender to represent both defendants, and upon the entry of guilty pleas,[66] the two were sentenced by the trial court, with Armstrong receiving a sentence of thirty years imprisonment.[67]

On appeal from an order denying post-conviction relief, the Mississippi Supreme Court held that although representation of co-de-

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memory lapse of the defendant and other witnesses, "record memory" of State witnesses without the benefit of proper foundation, resulting stigma and increase of anxiety for Handley, and death of Handley's chief witness. *Id.* at 10. The court noted that those instances only affected Handley's retrial and that Handley failed to show prejudice in the first trial as a result of the delay. *Id.*

Applying the same approach to the time between the mistrial and subsequent retrial, the court held that the six month delay was not presumptively prejudicial and, thus, there was no need to consider the remaining factors as Handley's constitutional right had not been violated. *Id.* at 11-12.

[63] Armstrong v. State, No. 89-0602 (Miss. Dec. 12, 1990) (discussed textually); McQuarter v. State, No. 07-59161, slip op. at 3 (Miss. Dec. 27, 1990) (test to apply during ineffective assistance of counsel claims is (1) whether counsel's overall performance was deficient and (2) if deficient, whether performance prejudiced defense when looking at totality of circumstances surrounding each case);State v. Tokman, 564 So. 2d 1339, 1342 (Miss. 1990) (counsel in capital sentencing proceeding has duty to at least interview potential witnesses and make independent investigation of facts and circumstances of case, including investigation into any mitigating circumstances so critical in such proceeding); Schmitt v. State, 560 So. 2d 148, 156 (Miss. 1990) (finding by trial court after full evidentiary hearing that defendant received effective assistance of counsel will not be set aside unless clearly erroneous).

[64] No. 89-0602 (Miss. Dec. 12, 1990).

[65] *Armstrong*, No. 89-0602, slip op. at 1-2. The two youths were involved in the robbery of Lee's Dollar Store in Crenshaw, Mississippi. *Id.* The facts established that Madkins planned the crime and stole the money. *Id.* at 2. While Madkins overpowered the store worker, he instructed Armstrong to take two Timex watches and $36.15 from the counter "when Linzie told him to." *Id.* The court noted that Armstrong's presence was purely "tag-along" and his participation minimal. *Id.*

[66] *Id.* at 2. The court appointed Ted Lucas Smith, public defender for Panola County, to represent both defendants, and on February 7, 1985 both Armstrong and Madkins were jointly indicted for armed robbery. *Id.*

[67] *Id.* at 2. Both defendants initially entered not guilty pleas, and a trial date was set for April 1, 1985. *Id.* On March 25, however, Armstrong signed a "Petition of Defendant for Court to Accept Plea," and subsequently he and Madkins, with the permission of the court, withdrew their not guilty pleas and offered pleas of guilty. *Id.*

fendants is not a *per se* violation of the sixth amendment, "prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance."[68] The court stated that effective representation includes loyalty and zealous advocacy for the client, both of which the court concluded were lacking in this case.[69] Since the public defender failed to say or do anything in mitigation at the sentencing hearing on behalf of either client for fear, perhaps, that to do so would characterize one as being more culpable than the other,[70] the court held that the attorney was laboring under an actual conflict of interest, thus rendering his assistance ineffective.[71] Furthermore, the court stated that the trial court's failure to inform Armstrong that a conflict existed[72] fell short of the required affirmative judicial involvement for accepting a waiver of the right to conflict-free representation.[73] The court thus reversed and remanded the cause for a new sentencing hearing.[74]

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[68] *Id.* at 6. On appeal, Armstrong asserted that he was denied his constitutional right to effective assistance of counsel based on his "counsel's failure to invoke procedural and substantive safeguards." *Id.* at 3. The court stated that representation of multiple criminal defendants raises unique dangers; therefore, courts which are aware that conflicts exist or are possible must take steps necessary to determine whether such conflict warrants separate counsel. *Id.* at 4.

The court cited the two-prong test delineated in MISS. RULES OF PROFESSIONAL CONDUCT 1.7(b), which provides in part:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest unless the lawyer reasonably believes: (1) the representation will not be adversely affected, and (2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved.

MISS. RULES OF PROFESSIONAL CONDUCT 1.7(b)). The court further noted that the comment to the rule above specifically recommends that an attorney decline to represent more than one co-defendant. *Armstrong*, No. 89-0602, slip op. at 5.

[69] *Armstrong*, No. 89-0602, slip op. at 8. The court stated in this case that the requirement of loyalty was adversely affected in that representation of co-defendants prevents an attorney from arguing relative involvement and culpability of the attorney's client at the sentencing phase. *Id.* (citing Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978)). The court thus reasoned that this denial of "undivided loyalty" prevented Armstrong's attorney from exercising the "zealous advocacy" required of every attorney. *Id.*

[70] *Id.* The court stated, for example, that defense counsel could have raised the fact that Armstrong was a very poor student, had no history of any school disciplinary problems, was being reared the youngest of nine children by his father in a single-parent household (his mother having died when he was an infant), his size, youth, and inexperience, and, most significantly, that it was Madkins who apparently masterminded the crime and actually stabbed the victim, all of which were mitigating factors for the sentencing purposes. *Id.* at 7.

[71] *Id.* at 10.

[72] *Armstrong*, No. 89-0602, slip op. at 10. The court stated that the trial court rea-

D. Eighth Amendment

In 1990, the Mississippi Supreme Court addressed the constitutionality of a fifteen year sentence without parole for the crime of forgery in the case of *Barnwell v. State*.[75] In *Barnwell*, the defendant was convicted of uttering a forged document[76] and was sentenced as an habitual offender to fifteen years imprisonment under Mississippi Code Annotated section 99-19-81 (Supp. 1990).[77] The court based its analysis on two factually dissimilar United States Supreme Court cases.[78] Upon

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sonably should have known that a conflict existed and should have informed Armstrong of such conflict pursuant to *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1972). *Armstrong*, slip op. at 9.

[73] *Armstrong*, No. 89-0602, slip op. at 9. The court stated that failure of the court to so inform Armstrong or follow the procedure outlined in *Garcia* violated his sixth amendment right to effective assistance of counsel. *Id.* at 10.

[74] *Id.* at 10. The court stated that since Armstrong received ineffective assistance of counsel as a matter of law, reversal was automatic regardless of whether there was a showing of prejudice, unless the defendant knowingly and intelligently waived his constitutional right, which did not occur in this case. *Id.*

[75] 567 So. 2d 215 (Miss. 1990).

[76] *Barnwell*, 567 So. 2d at 216. The defendant, Lonell Barnwell, who attempted to try the case himself, aided by his appointed counsel, presented no witnesses, and the jury convicted Barnwell after only nine minutes of deliberation. *Id.* at 217.

[77] *Id.* at 217. Miss. Code Ann. § 99-19-81 (Supp. 1990), provides that every person convicted of a felony as an habitual offender "shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation."

[78] *Barnwell*, 567 So. 2d at 221-22. The court stated its decision was guided by *Rummel v. Estelle*, 445 U.S. 263 (1980) and *Solem v. Helm*, 463 U.S. 277 (1983). The defendant in *Rummel* had been convicted twice before of two non-violent felonies. Upon his conviction of obtaining $120.75 by false pretenses, he was sentenced under the Texas habitual offender statute to life in prison with the possibility of parole. *Barnwell*, 567 So. 2d at 219 (citing *Rummell*, 445 U.S. at 267). Based on the particular context of that case, the *Rummel* Court rejected the proportionality analysis later adopted in *Solem v. Hel*m and held that the sentence did not violate the eighth amendment. *Barnwell*, 567 So. 2d at 219. The defendant in *Solem* had been convicted of six non-violent felonies prior to his conviction of uttering a "no account" check for which a South Dakota court sentenced him to life without parole pursuant to that state's habitual offender statute. *Id.* at 220 (citing *Solem*, 463 U.S. at 282). The *Solem* Court held the sentence disproportionate and set out the following criteria for guiding a reviewing court's proportionality analysis: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Barnwell*, 567 So. 2d at 220 (citing *Solem*,

review of two prior Mississippi cases and also the law of other jurisdictions, the court announced that it was adopting the general principles contained in both *Rummel* and *Solem*.[79] The court further ruled that apart from the factual context of *Solem*, life sentence without parole, or a sentence manifestly disproportionate to the crime, an extended proportionality analysis is not required by the eighth amendment.[80] Instead, the court stated that it would give substantial deference to the broad authority of the legislature to determine the limits of punishment for crimes[81] and upheld the sentence as not cruel and unusual under the eighth amendment.[82]

E. Indictments

In *Quick v. State*,[83] the court explained that no court has the power to amend an indictment with regard to substantive matters without the grand jury's concurrence[84] even though a court may amend the indictment with regard to mere informalities.[85] The court determined that the state could only prosecute on the indictment as delivered by the grand jury and that a court does not have the authority to

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463 U.S. at 282-83).

[79] *Barnwell*, 567 So. 2d at 221-22. The two prior Mississippi cases relied on by the court were *Seely v. State*, 451 So. 2d 213 (Miss. 1990) and *Burt v. State*, 493 So. 2d 1325 (Miss. 1990), in both of which the court upheld the identical crime and punishment as in the instant case. *Barnwell*, 567 So. 2d at 221.

[80] *Barnwell*, 567 So. 2d at 221.

[81] *Id.* at 222. The court stated that its holding was consistent with the overriding theme seen in both *Solem* and *Rummel* of giving substantial deference to the legislature and the trial courts in determining the limits for punishment for crimes. *Id.* In addition, the court stated that the principles articulated were consistent with Mississippi case law on the subject. *Id.*

[82] *Id.* The court concluded that it has repeatedly held that although no sentence is *per se* constitutional, where such sentence is within the statutory limit, it will generally not be regarded as cruel and unusual. *Id.*

[83] 569 So. 2d 1197 (Miss. 1990).

[84] *Quick*, 569 So. 2d at 1199. Quick was indicted for aggravated assault under MISS. CODE ANN. § 97-3-7(2)(b) (1972), by the Pearl River County grand jury. *Quick*, 569 So. 2d at 1198. On the morning of the trial, the prosecution moved to amend the indictment under sub-section (b), which required purposeful, willful and knowing actions, to also include a charge under sub-section (a) of the statute, which included "intentionally or recklessly under circumstances manifesting extreme indifference to the value of human life." *Id.* (citing MISS. CODE ANN. § 97-3-7(2)(a) (1972)). Although the record did not disclose an order permitting the amendment, the instructions submitted to the jury were changed to reflect the language of the proposed amendment. *Id.* at 1198-99.

[85] *Quick*, 569 So. 2d at 1199. The court determined that the proposed change to the indictment constituted a change of substance and not of form. *Id.* at 1200.

make material modifications or amendments to the indictment.[86]

In *Allman v. State*,[87] a decision concerning multiple counts in an indictment,[88] the court found that since the three counts of the indictment involved the same type of conduct committed upon the same person, only at different times, then such "stacking" was permitted under Mississippi Code Annotated section 99-7-2(1) (Supp. 1989).[89]

In *Brooks v. State*,[90] a decision regarding deficiencies in an indictment,[91] the court held that technical and non-jurisdictional deficiencies in an indictment were waived if the issue was not raised timely in the trial court.[92] The court explained that deficiencies in an indictment may not be raised for the first time in the post-conviction relief application nor on direct appeal unless the defendant can demonstrate a showing of cause and actual prejudice.[93] The court further explained that defects in an indictment that were non-jurisdictional in nature were waived upon entry by the defendant of a voluntary guilty plea.[94]

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[86] *Id.* at 1199. The court reversed and remanded the case since the instructions given to the jury reflected the additional charge which was not contained in the original indictment and since this element of the instructions appeared to be the basis of the jury's verdict. *Id.* at 1200.

[87] 571 So. 2d 244 (Miss. 1990).

[88] *Allman*, 571 So. 2d at 248. The appellant, Ernest Lee Allman, was indicted by the George County grand jury on a single indictment containing three counts of raping his niece, C.A., who was ten years old at the time of the alleged incidents. *Id.* at 245. Allman was found guilty on two of the three counts and was sentenced to life imprisonment for each count with the sentences to run concurrently. *Id.*

[89] *Id.* at 248. The statute section 99-7-2(1) appears in pertinent part as follows:

> (1) Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a separate count for each offense if: (a) the offenses are based on the same act or transaction; or (b) the offenses are based on two (2) or more acts or transactions connected together or constituting parts of a common scheme or plan.

MISS. CODE ANN. § 99-7-2(1) (Supp. 1990).

According to the court, the transactions were "*connected* by the identity of the victim and by the identity of the kind of act [rape] committed". *Allman*, 571 So. 2d at 248 (emphasis in original). Furthermore, the court found that the two rapes and alleged attempted rape were properly joined under one indictment pursuant to MISS. CODE ANN. § 99-7-2(1)(b) (Supp. 1990), since these actions represented part of a common scheme or plan as required by the statute. *Allman*, 571 So. 2d at 249.

[90] No. 89-0395 (Miss. Dec. 19, 1990).

[91] *Brooks*, No. 89-0395, slip op. at 2. The appellant, N. S. Brooks, pled guilty to eight burglary and robbery charges in May of 1987, and was sentenced to fifteen years imprisonment. *Id.* at 1. In 1989, Brooks applied to the circuit court to vacate his pleas of guilty in a pleading styled as "Motion To Vacate Judgment and Conviction." *Id.* The circuit judge denied Brooks' motion and found that the issues raised by Brooks were waived upon his pleas of guilty to the charges except as to the claim of ineffective assistance of counsel, which did not meet the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). Brooks then filed a direct appeal to the Mississippi Supreme Court claiming that the indictments were defective because the record did not identify the indictments as the ones returned by the grand jury, because the indictments were not accompanied by the affidavit of the grand jury foreman, and because the circuit court lacked jurisdiction to prosecute him due to the facially defective indictments. *Id.* at 2.

[92] *Id.* at 5. As to the indictments being defective because the record did not identify

F. Judge Disqualification

The Mississippi Supreme Court in 1990 handed down two decisions concerning factual circumstances that required the disqualification of a judge. In *Jenkins v. State*,[95] the judge, sitting in the trial in which the defendant was convicted of manslaughter, had previously been the county prosecuting attorney at the time of the defendant's indictment.[96] The Mississippi Supreme Court reversed and remanded the defendant's conviction and sentence.[97] The court compared the situation in *Jenkins* to that of a grand juror subsequently sitting on the petit jury for a defendant he or she indicted, and the court condemned such a practice stating the accuser may not also act as trier of fact.[98]

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the indictment as the ones returned by the grand jury of Lowndes County and because the indictments were not accompanied with the grand jury foreman's affidavit, the court held that these deficiencies were technical and non-jurisdictional, and waived when not timely raised. *Id.* at 7. In addition, the court determined that Brooks had not shown the indictments to be defective, but even assuming they were, his third claim of lack of jurisdiction by the circuit court was without merit because any defects were non-jurisdictional in nature. *Id.* at 8.

[93] *Id.* at 5; *see* MISS. CODE ANN. § 99-39-21(1) (Supp. 1990) ("a showing of cause and actual prejudice" required). The court determined that Brooks did not demonstrate "even remotely . . . a showing of cause and actual prejudice as those terms are defined by § 99-39-21(4) and (5)." *Brooks*, No. 89-0395, slip op. at 8.

[94] *Brooks*, No. 89-0395, slip op. at 7. The court explained that a valid guilty plea admitted all elements of a formal criminal charge and operated as a waiver of all non-jurisdictional defects contained in the indictment. *Id.* at 5.

[95] 570 So. 2d 1191 (Miss. 1990).

[96] *Jenkins*, 570 So. 2d at 1191. Jerry Yeager was hired to serve as county prosecuting attorney for Smith County from October 1, 1988 until January 5, 1992. *Id.* The defendant, Dwight Jenkins was indicted February 3, 1989 in Smith County during Yeager's term as prosecuting attorney and was tried in Smith County during April of 1989, before the same Jerry Yeager who had since been appointed as special judge for the March and April 1989 terms when Judge Luther Pittman became ill. *Id.*

[97] *Id.* at 1193.

[98] *Id.* at 1192. The court relied on MISS. CONST. art. 6, § 165 (1890), which requires a judge to disqualify himself where he may be "interested" in the case or parties and MISS. CODE ANN. § 9-1-11 (1972), which requires disqualification for a judge where he may have been of counsel. *Jenkins*, 570 So. 2d at 1192. Furthermore, the court cited Canon 3 of the Code of Judicial Conduct, which requires disqualification for a judge where impartiality might reasonably be questioned, personal bias may exist, the judge may have personal

The court applied a previously adopted objective and held in the affirmative, stating that a reasonable person would certainly have questioned the judge's impartiality.[99] In *Moore v. State*,[100] the court, in a case similar to the *Jenkins* case, found that a trial judge who ruled against a motion to vacate a sentence filed in 1987 must disqualify himself where he had been the district attorney who had signed the indictment of the defendant in 1966.[101]

EVIDENCE: MISCELLANEOUS

The Mississippi Supreme Court addressed during 1990 numerous evidentiary issues including or regarding prior convictions,[102] other wrongs,[103] hearsay,[104] tape recordings,[105] a victim's reputation for vio-

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knowledge of disputed evidentiary facts or where he or she served as lawyer in the matter in controversy. *Jenkins*, 570 So. 2d at 1192.

[99] *Jenkins*, 570 So. 2d at 1193. The case of *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986) held that a judge is required to disqualify himself if a reasonable person with knowledge of all the circumstances would harbor doubts about the judge's impartiality. The court in *Jenkins* noted that the functions of county prosecuting attorney and judges are so contradictory that no person could be considered impartial. *Jenkins*, 570 So. 2d at 1193. The court further held that Jenkins had been denied due process under the MISS. CONST. art. 3, § 14 (1890), which requires a fair and impartial trial. *Id.*

[100] No. 07-59565 (Miss. Dec. 12, 1990).

[101] *Moore*, No. 07-59565, slip op. at 2. On December 21, 1987, the defendant filed a motion to vacate and set aside the sentence based on the notion that the plea was not knowingly made and ineffective assistance of counsel. *Id.* at 1. The defendant also alleged several procedural defects in the indictment. *Id.* The Mississippi Supreme Court, however, reversed and remanded the ruling on the motion based on the judge's conflict of interest since he had been the district attorney in 1966. *Id.*; *see* Smith v. State, 54 So. 2d 739, 741 (Miss. 1951) (one activity engaged in prosecution of another is disqualified from sitting as judge in same matter).

[102] McGee v. State, 569 So. 2d 1191, 1194-97 (Miss. 1990) (when confronted with issue of whether to allow proof of prior crime under MISS. R. EVID. 609, trial judge must perform on-the-record weighing of probative value of conviction against its prejudicial effect); Davis v. State, 568 So. 2d 277, 278-79 (Miss. 1990) (where witness makes isolated, inadvertent reference to defendant's other alleged crimes and reference does not substantially prejudice trial, then not reversible error to deny mistrial); Rowe v. State, 562 So. 2d 121, 122-23 (Miss. 1990) (State can offer evidence of prior convictions to rebut defendant's evidence that he is not prone to violence).

[103] Lewis v. State, No. 07-59296, slip op. at 4-5 (Miss. Dec 19, 1990) (MISS. R. EVID. 404(b) provides evidence of past acts for which the person was either convicted or not convicted may be properly introduced as evidence to establish motive, intent, plan, knowledge, or absence of mistake or accident); Hudgins v. State, 569 So. 2d 1206, 1208-09 (Miss. 1990) (allowing improper evidence of other offense was judicial error where judge did not sustain objection or give cautionary instruction to jury); Rose v. State, 556 So. 2d 728, 730-31 (Miss. 1990) (where defendant has not placed her character in issue and evidence is not offered in support of element of crime, MISS. R. EVID. 404(b) bars

lence,[106] gruesome photographs,[107] chain of custody,[108] Miranda warnings,[109] photo line-ups,[110] lay opinions,[111] authentication of intoxilyzer results,[112] constructive possession of contraband,[113] and judicial notice

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evidence of past wrongs intended to show conformity with past actions).

[104] Lambert v. State, No. 89-0576, slip op. at 411 (Miss. Dec. 12, 1990) (where hearsay statements of victim were erroneously received as evidence, error may be legally harmless because victim testified and was subject to cross-examination on matters in issue); Turner v. State, No. 89-0841, slip op. at 5-6 (Miss. Dec. 12, 1990) (statement identifying defendant made by hearsay declarant while observing defendant is admissible through witness to the statement by MISS. R. EVID. 803(1) as present sense impression); Mitchell v. State, No. 07-59265, slip op. at 4-8 (Miss. Dec 5, 1990) (if witness is unavailable after diligent search, then transcript of witness' testimony in prior trial is admissible as exception to hearsay); Brown v. State, 556 So. 2d 338, 340-42 (Miss. 1990) (where non-party declarant admits having made prior inconsistent statement, then impeachment is served without reading the hearsay statement).

[105] Pettit v. State, 569 So. 2d 678, 680 (Miss. 1990) (MISS. UNIF. CRIM. R. CIR. CT. PRAC. 514 mandates that copies of admitted evidence, including tape recordings, be allowed in jury deliberation room); Cockrell v. State, 566 So. 2d 1243, 1244-46 (Miss. 1990); Doby v. State, 557 So.2d 533, 540-42 (Miss. 1990) (citing Middlebrook v. State, 555 So. 2d 1009, 1011-14 (Miss. 1990)); Middlebrook v. State, 555 So. 2d 1009, 1011-14 (Miss. 1990) (where tape recording of illegal transaction, which is inaudible in substantial part, is introduced against accused, recording is not *per se* inadmissable if prosecution first authenticates recording pursuant to MISS. R. EVID. 901(a) and 901(b)(5) and then establishes its legal relevance pursuant to MISS. R. EVID. 401).

[106] Robinson v. State, 566 So. 2d 1240, 1240-42 (Miss. 1990) (for defendant to introduce evidence of victim's character for violence, offer of evidence by defendant of overt act against him by victim must first be offered).

[107] Gardner v. State, No. 59,290, slip op. at 5-7 (Miss. Dec. 19, 1990) (gruesomeness of photograph does not bar admission if more probative than prejudicial); Sudduth v. State, 562 So. 2d 67, 69-70 (Miss. 1990) (same).

[108] Hemphill v. State, 566 So. 2d 207, 208-09 (Miss. 1990) (burden to prove broken chain of custody rests on defendant since presumption of regularity supports public officers).

[109] Bevill v. State, 556 So. 2d 699, 708-10 (Miss. 1990) (defendant's admission without Miranda warning must be suppressed).

[110] Powell v. State, 566 So. 2d 1228, 1235-39 (Miss. 1990) (where witness had good view of perpetrator, then method used by police in identification recedes in importance).

[111] Roberson v. State, 569 So. 2d 691, 694-96 (Miss. 1990) (MISS. R. EVID. 701 requires that for lay opinion to be admissible, witness must have first-hand knowledge or observation and opinion must be helpful in resolving issues).

[112] Johnston v. State, 567 So. 2d 237, 239-49 (Miss. 1990) (intoxilyzer test result is admissible only if test is performed according to approved methods, by certified person, and on certified machine).

[113] Pate v. State, 557 So. 2d 1183, 1184-87 (Miss. 1990) (where accused is not in actual possession of contraband nor in exclusive possession of premises, then accused should be acquitted unless prosecution presents competent evidence connecting him to contraband).

of venue.[114]

The Mississippi Supreme Court dealt with a dying declaration in *Ellis v. State.*[115] The court interpreted Rule 804(b)(2) of the Mississippi Rules of Evidence as continuing the "pre-Rules premise that the declarant's belief his death was imminent may be shown circumstantially by the apparent fatal quality of his wound."[116]

In *Pettit v. State,*[117] the court held that the trial court erred, although harmlessly, in refusing to allow a tape recording which had been admitted into evidence to go to the jury.[118] The court held it to be mandatory, within reason, to submit exhibits to the jury.[119]

The court considered the unavailability of the declarant as an exception to the hearsay rule in *Mitchell v. State.*[120] The hearsay statement came from a transcript of the prior trial of the case for conspiracy to murder in which the hit man testified to Mitchell's trying to hire him.[121] The court held that the State had met its burden of proving that a "good faith effort" had been made in locating the declarant, but that the declarant was unavailable.[122]

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[114] Jackson v. State, 556 So. 2d 335, 336-37 (Miss. 1990) (court may judicially notice venue of crime when evidence relating to crime scene unambiguously places crime within venue of court although county and state were not specifically named).

[115] 558 So. 2d 826 (Miss. 1990).

[116] *Ellis*, 558 So. 2d at 830. The court found that the trial court had not erred in admitting the decedent's dying declaration identifying his killer. *Id.* The court noted that a doctor's testimony that the decedent had been shot through the heart provided sufficient circumstantial evidence to establish decedent's knowledge of his imminent death. *Id.*

[117] 569 So. 2d 678 (Miss. 1990).

[118] *Pettit*, 569 So. 2d at 680. The State introduced into evidence the tape recording of the subject drug transaction and played the tape for the jury. *Id.* The trial court did not allow the tape to be submitted to the jury during its deliberations, likening the tape to a transcript of trial testimony. *Id.*

[119] *Id.* The court referred to Mississippi Uniform Criminal Rule of Circuit Court Practice 5.14 which states in part that "[t]he court shall permit the jury, upon retiring for deliberation, to take to the jury room a copy of the instructions and exhibits and writings which have been received in evidence, except depositions." *Petit*, 569 So. 2d at 680. The court also relied on its prior decision in *Coulter v. State*, 506 So.2d 282, 286 (Miss. 1987), where the court emphasized the word "shall" in allowing a written confession to be carried into the jury room. *Pettit*, 569 So. 2d at 680.

[120] No. 59,265 (Miss. Dec. 5, 1990).

[121] *Mitchell*, No. 59,265., slip op. at 4.

[122] *Id.* at 6-7. The prosecution presented evidence of an extensive search for the declarant, to include obtaining a subpoena and contacting the FBI and his friends and relatives. *Id.* at 7.

PRIVILEGED COMMUNICATIONS

The Mississippi Supreme Court addressed the psychologist-patient privilege in *Everett v. State*.[123] Prior to his arrest, Everett consulted a therapist concerning his sexual molestation of his step-daughter.[124] Prior to the trial, the therapist wrote a letter at Everett's request to the judge concerning his prognosis stating that Everett could be reformed.[125] Although the letter was not introduced into evidence, the therapist was allowed to testify that Everett admitted molesting the victim.[126]

The court held that the trial court did not err in allowing the therapist to testify.[127] The court first rejected the State's contention that Mississippi Code Annotated section 43-21-353 (Supp. 1989),[128] creates a child abuse exception to the psychologist-patient privilege of section 73-31-29.[129] The court found that the duty imposed on psychologists by section 43-21-353 to report child abuse only arises when the child is treated, not when the offender is treated.[130] However, the court found merit in the State's second contention, that the communication was not privileged since Everett intended by his request of the letter to the judge that his communication be disclosed to a third person.[131]

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[123] No. 59,096 (Miss. Aug. 22, 1990).

[124] *Everett*, No. 59,096, slip op. at 1. The victim had informed her mother of Everett's actions prior to his seeking treatment. *Id.*

[125] *Id.* at 2. The letter related Everett's involvement in therapy, his "sincere remorse," and his "high potential for change." *Id.* (quoting letter from Ray Hale, psychologist, to judge in Everett's trial (Aug. 2, 1985)).

[126] *Id.* at 2.

[127] *Id.* at 4.

[128] *Id.* at 3. The statute provides in pertinent part:

> Any . . ., psychologist, . . . or any other person having reasonable cause to suspect that a child brought to him or coming before him for examination, care or treatment, or of whom he has knowledge through observation is a neglected child or an abused child, shall cause an oral report to be made immediately by telephone or otherwise and followed as soon thereafter as possible by report in writing to the Department of Public Welfare, and immediately referral shall be made by the Department of Public Welfare to the intake unit and where appropriate to the youth court prosecutor. . . .

MISS. CODE ANN. § 43-21-353 (Supp. 1989).

[129] *Everett*, No. 59,096, slip op. at 3. Section 783-31-29 provides:

> A psychologist shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall a psychologist's secretary, stenographer or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity.

MISS. CODE ANN. § 73-31-29 (1972).

[130] *Everett*, No. 59,096, slip op. at 3. The court reasoned that absent the privilege, people like Everett would not seek treatment. *Id.*

EXPERTS

The Mississippi Supreme Court considered the admissability of expert opinions in two child-molestation cases. In *Hosford v. State*,[132] the court held that the trial court erred harmlessly in allowing a child therapist, Chance, to testify about a child sexual abuse profile.[133] The court reasoned that at present there is not a profile of typical child sexual abuse characteristics that is generally accepted by the scientific community.[134] On a closely related issue, the court held that under the unusual facts of this case the trial court did not err in permitting Chance to testify to her conclusion that the child had been sexually abused.[135] The court based its holding on the defense having admitted that the child had been sexually abused by someone.[136]

The court relied on *Hosford* in its later consideration of *Goodson v. State*.[137] The court held that the trial court committed reversible error in allowing a medical doctor, Chidester, to opine that the child had been sexually abused.[138] The court's first basis for its holding was that Dr. Chidester had not been qualified as professionally competent to enter such an opinion.[139] The court then addressed the underlying issue of whether Dr. Chidester's opinion that the child had been sexually abused was admissible.[140] The court found that child sexual abuse is not a scientific field within which there are generally accepted techniques and practices which will produce a valid opinion.[141] The court found controlling *Hosford*'s holding against admission of an expert opinion on child sexual abuse due to lack of a generally recognized scientific profile.[142] The court thus ruled that it was error to admit Dr. Chidester's opinion for lack of an established and scientific predicate and because Dr. Chidester was not shown qualified as an expert in the field of child sexual abuse.[143]

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[131] *Id.* at 4. The Mississippi Rules of Evidence provide:

> A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

MISS. R. EVID. 503 (a)(4).

[132] 560 So. 2d 163 (Miss. 1990).

[133] *Hosford*, 560 So. 2d at 168. The court found this error harmless; the defense admitted that the child was sexually abused, but contended that the defendant was not the abuser. *Id.*

[134] *Id.* (citing Myers, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 69 (1989)).

[135] *Id.* at 170. The court found that most of Chance's testimony regarding her observation of the child's behavior was unquestionably admissible; the court was concerned only about that part of Chance's testimony relating her opinion that the child had been abused. *Id.* at 169-70.

[136] *Id.* at 170.

[137] 566 So. 2d 1142 (Miss. 1990).

[138] *Goodson*, 566 So. 2d at 1148. The court reversed since "there was a substantial probability that the jury would be misled by Dr. Chidester's opinion." *Id.*

[139] *Id.* at 1145-46. The court noted that Dr. Chidester was a practicing physician but had no specialized training in the field of child sexual abuse. *Id.* at 1144. The only sup-

INSTRUCTIONS TO JURY

The decisions by the Mississippi Supreme Court in 1990 concerning jury instructions dealt with a wide variety of issues. In addition to the cases discussed hereinafter, the court ruled on the following issues during the 1990 term: proper terminology of instructions concerning accomplice testimony,[144] evidentiary requirements for manslaughter in-

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port in the record was Chidester's statement that she had a tremendous amount of related experience; no further details were provided. *Id.* at 1145. Interestingly, the court mentioned that the prosecution on appeal did not try to defend Chidester as an expert, but instead tried to argue that her opinion was admissible as a lay opinion. *Id.*

[140] *Id.* at 1146.

[141] *Id.* (citing Mississippi Farm Bureau Ins. Co. v. Garrett, 487 So.2d 1320, 1326 (Miss. 1986)("Is the field of expertise one in which it has been scientifically established that due investigation and study in conformity with techniques and practices generally accepted within the field will produce a valid opinion?")).

[142] *Id.* at 1147. The court noted that MISS. R. EVID. 702, as interpreted by the court, "recognizes that the behavioral sciences do not generate opinions that are accepted with confidence as great as those emanating from experts in the natural or physical sciences." *Goodson*, 566 So. 2d at 1147.

[143] *Goodson*, 566 So. 2d at 1147. Justice Hawkins, dissenting, argued that Dr. Chidester did not opine that the victim had been sexually abused, but only that the girl had "an unpleasant experience involving her sexual organs." *Id.* at 1156. Further, Justice Hawkins felt that Chidester's opinion was "well within range of permissible opinions by physicians." *Id.* He found the "majority's niggling and totally negative approach to admission of expert testimony in child sexual abuse cases quite at odds with the treatment this court has of recent years given to proferred expert testimony in other areas." *Id.* at 1157.

[144] Wheeler v. State, 560 So. 2d 171 (Miss. 1990). In 1982, an armed robbery occurred and one accomplice in the crime testified against defendant Wheeler concerning his alleged involvement in exchange for complete immunity. *Id.* The trial judge refused to instruct the jury that the testimony of the accomplice was to be viewed with suspicion and distrust as requested by the defendant and instead instructed the jury to regard the testimony with great care and caution. *Id.* at 172. The Mississippi Supreme Court reversed and remanded holding that the testimony of an accomplice should be regarded

structions,[145] burden of proof necessary in a case based wholly on circumstantial evidence,[146] inapplicability of the *Weathersby Rule*,[147] necessity of jury instructions to list all essential elements of a criminal charge[148] and failure in giving a jury instruction if the jury is fairly

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with "great caution and suspicion." *Id.* at 173. The court found that the trial judge abused his discretion in permitting only an instruction worded "great care and caution." *Id.* The court noted that when there is lack of evidence and lack of corroboration to the testimony of an accomplice, the stronger word of "suspicion" was more appropriate for the jury instruction. *Id.*

[145] Barnett v. State, 563 So. 2d 1377 (Miss. 1990). In *Barnett*, the defendant Barnett was convicted of murder and he appealed the failure of the court to grant a manslaughter instruction as well as the granting of one of the state's instructions. *Id.* at 1378. Defendant Barnett got into a fight with Robert Harmon, Harmon pulled out a knife, the defendant obtained a shovel and according to some, tapped Harmon on the shoulder with it and then the defendant left the immediate area. *Id.* at 1378-79. The defendant returned with a loaded .22 rifle and shot Harmon. *Id.* at 1379. The dispute is whether Harmon was advancing on the defendant with a knife and whether the killing was in self defense. *Id.* The Mississippi Supreme Court affirmed the conviction finding no evidence existed to support a manslaughter instruction proffered by the defendant based on a killing under a provoked rage since there was no gross insult and the two were not engaged in physical combat. *Id.* The court further held that one of the state's instructions was not impermissibly granted and any error committed was waived by the defendant since he failed to make a specific objection. *Id.* at 1380.

[146] Murphy v. State, 566 So. 2d 1201 (Miss. 1990) (when State relies solely on circumstantial evidence, defendant's guilt must be proven beyond reasonable doubt and to exclusion of every reasonable hypothesis consistent with innocence).

[147] Buchanan v. State, 567 So. 2d 194 (Miss. 1990) (court held *Weathersby* rule did not apply where physical facts and circumstances in evidence materially contradicted defendant's version of self-defense, particularly, expert testimony that bullet entered victim's back).

[148] Jones v. State, 567 So. 2d 1189 (Miss. 1990). In *Jones*, the defendant and three other persons were riding in a car in Horn Lake, when he and another entered a convenience store. *Id.* at 1190. The defendant walked to the restroom apparently with a gun concealed while the other took cigarettes out of a cabinet and dropped them in a sack according to the store attendant, Connie Williamson. *Id.* Williamson further testified that she was on the phone to the police, the defendant came out of the restroom, the other person handed him the cigarettes and grabbed the Muscular Dystrophy jar from the rack. *Id.* Subsequently, they both ran to the car and were later detained by Horn Lake police officers. *Id.* The trial court convicted the defendant of conspiracy to commit robbery and strong armed robbery. *Id.* The Mississippi Supreme Court reversed in part and remanded for resentencing for grand larceny. *Id.* at 1192. The court first found that despite the lack of a charge of aggravated assault on a police officer, evidence of the assault which occurred after the police officer detained the defendant was admissible since it was closely related in time, place and fact with the purported crime. *Id.* at 1190. Further, the court found no justification for a conviction of conspiracy to commit robbery since the evidence failed to show proof of common design or understood purpose to commit robbery or any other crime. *Id.* at 1191. The court also held the State's instruction concerning the elements of robbery was insufficient since it did not specifically set

informed.[149]

In the case of *Robinson v. State*,[150] the Mississippi Supreme Court confronted the question of whether a jury instruction of simple negligence should be included with an instruction of manslaughter by culpable negligence for comparison purposes.[151] The defendant was found guilty of manslaughter by culpable negligence and two counts of aggravated assault in an incident which resulted in the death of the niece of the defendant's girlfriend.[152] The Mississippi Supreme Court reversed in part and affirmed in part.[153] The court first applied the established doctrine that an instruction on a lesser included offense should be denied when the evidence could only justify a conviction on the principal charge.[154] Reviewing the evidence, the court found the evidence clearly could have supported a simple assault conviction, and therefore, the failure of the trial court to give the lesser included offense instruction demanded reversal.[155] Interestingly, the court found that although no law requires submission of an instruction of simple negligence for comparison purposes with the instruction of manslaughter by culpable negligence, the practice is encouraged since juries are overly inclined to

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out the cause and effect relationship between the taking of personal property and putting in fear of immediate injury. *Id.* at 1192.

[149] Smith v. State, No. 07-59241 (Miss. Oct. 24, 1990) (unless trial record shows objection to jury instruction, admission of instruction is not reversible error; and denial of jury instruction is not error if jury was fairly and fully instructed on law).

[150] 571 So. 2d 275 (Miss. 1990).

[151] *Robinson*, 571 So. 2d at 277. The court also confronted other assignments of error, particularly whether the verdict was against the overwhelming weight of the evidence. *Id.*

[152] *Id.* The defendant, Eddie Lee Robinson, and his girlfriend Gwendolyn Lee became engaged in a heated argument and during the argument, the defendant obtained a gas can threatening to ignite Ms. Lee. *Id.* at 1276. Ms. Lee knocked the can out of the defendant's hands, the gas spilled on the floor of Ms. Lee's mother's home and the fight continued, eventually taking the parties outside. *Id.* Meanwhile, the house caught on fire and Ms. Lee's niece, who was in the home, was killed. *Id.*

[153] *Id.* at 277.

[154] *Id.* at 276 (citing Lee v. State, 469 So. 2d 1225, 1231 (Miss. 1984); Ruffin v. State, 444 So. 2d 839, 840 (Miss. 1984)). The court added that the test of whether to include lesser included offense instructions is whether there was sufficient evidence so that a reasonable juror could have determined the defendant was guilty only of simple assault rather than aggravated assault. *Robinson*, 571 So. 2d at 276 (citing Harvin v. State, 478 So. 2d 796, 799 (Miss. 1985)).

[155] *Robinson*, 571 So. 2d at 277. The court noted that the defendant never poured gas on Ms. Lee, he denied physically threatening her, he chased Ms. Lee out of the house and immediately let her go when he realized the house was on fire. *Id.* at 276. Considering the evidence together the court believed the testimony was sufficient to warrant only a simple assault charge and the defendant was entitled to such an instruction. *Id.* at 277.

convict under the statute.[156] The court, however, did not mandate such an action and the manslaughter by culpable negligence conviction was affirmed.[157]

The Mississippi Supreme Court dealt with the issue of when self-defense should be submitted to the jury in the case of *Anderson v. State.*[158] In *Anderson,* the defendant was convicted of aggravated assault; however, evidence indicated that the defendant may have acted in self-defense.[159] The Mississippi Supreme Court reversed and remanded, stating that there was an evidentiary predicate upon which the injury may have vindicated the defendant on the ground of self-defense.[160] The court noted that whether the issue of self-defense should be submitted to the jury ultimately turns on whether there is credible evidence in the record to support it.[161] The court found that there was sufficient evidence in the case so that a rational jury might have found for the defendant; thus, the failure to allow the instructions warranted a reversal.[162] The court added that the fact that the defense was allowed to argue self-defense to the jury did not cure the failure of the court to admit the jury instruction on self-defense.[163]

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[156] *Id.*

[157] *Id.*

[158] 571 So. 2d 961 (Miss. 1990).

[159] *Anderson,* 571 So. 2d at 962. The defendant, Delores Anderson slashed the victim Delores Brown causing serious injury to Brown's neck. *Id.* Some of the testimony in the case, particularly that of the defendant, indicated that the victim may have been the first aggressor with an ice pick and that the victim may have caused a slight cut on the defendant's face. *Id.* at 963.

[160] *Id.* at 964. The court noted that no instructions were received setting out the elements of self-defense. *Id.* The court also stated that self-defense is a long recognized defense to prosecution for assault. *Id.* at 963.

[161] *Id.* at 964. The elements of self defense require that the danger to the defendant must be either actual, present and urgent, or defendant must have reasonable grounds to apprehend design on the part of the victim to kill, or to do him some great bodily harm, and, in addition, there must be imminent danger of such a design being accomplished. *Id.* at 963 (citing Jones v. State, 418 So. 2d 832, 833 (Miss. 1982)). The court stated that where evidence warrants self-defense as a claim, the party claiming it has a right to submit it as an instruction to the jury. *Id.* at 964.

[162] *Id.* The court noted the testimony that the victim obtained an ice pick and struck the defendant prior to the stabbing of the victim. *Id.* at 963. Considering all other evidence, the evidence clearly warranted an instruction on the claim of self-defense. *Id.* at 964. The court added that despite the form of the instruction submitted by the defendant on self-defense but denied, since the prosecution made no objection as to the form, it was considered as properly submitted. *Id.*

[163] *Id.*

SENTENCING

The Mississippi Supreme Court rendered a number of decisions in 1990 regarding the sentencing of criminal defendants. Those decisions dealt with various issues, including the death penalty,[164] recidivism,[165] alternative sentencing of minors,[166] enhanced sentencing,[167] and a circuit court's sentencing authority.[168]

A. The Death Penalty

In *Turner v. State*,[168] the court held that at the sentencing phase of a capital murder trial, the jury is entitled to know whether a defendant would be eligible for parole if given a life sentence rather than the death penalty.[170] In *Turner*, the defendant, Kevin Lewis Turner, was indicted for the capital murder/robbery of Elizabeth Blakely.[171] Turner was convicted of capital murder, and in a bifurcated trial, the jury returned a sentence of death.[172] After Turner was sentenced, the trial judge conducted a hearing and adjudged him to be a habitual offender.[173] On appeal, Turner argued that the preclusion of evidence of his habitual offender status and the trial court's refusal to instruct the jury that he would never be eligible for parole if given a life sentence was reversible error.[174]

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[164] Mackbee v. State, No. 03-00-89, slip op. at 41 (Miss. Dec. 27, 1990) (habitual offender who is ineligible for parole if given life sentence entitled to have jury consider ineligibility as mitigating factor when considering death sentence); Berry v. State, No. 89-DP-199, slip op. at 21 (Miss. Dec. 19, 1990) (habitual offender hearing should be held prior to sentencing phase, and jury should be informed that life sentence without probation or parole is alternative to death penalty); Turner v. State, 573 So. 2d 657 (Miss. 1990) (discussed textually).

[165] Pittman v. State, 576 So. 2d 1205 (Miss. 1990) (discussed textually); Kolb v. State, 568 So. 2d 288 (Miss. 1990) (discussed textually); Beckham v. State, 556 So. 2d 343 (Miss. 1990) (conviction under MISS. CODE ANN. § 97-9-45 (Supp. 1990), which results in forfeiture of earned time toward parole, constitutes felony for purposes of MISS. CODE ANN. § 99-19-83 (Supp. 1990), habitual offender statute).

[166] *See infra* notes 38-47 and accompanying text.

[167] Lane v. State, 562 So. 2d 1235, 1237 (Miss. 1990)(conviction for conspiracy to possess cocaine pursuant to MISS. CODE ANN. § 41-29-139(a)(1) (1972) falls within enhanced sentencing provision of conspiracy statute, MISS. CODE ANN. § 97-1-1 (1972)); Sheffield v. City of Pass Christian, 556 So. 2d 1052, 1053 (Miss. 1990)(prior uncounseled convictions constitutionally valid in and of themselves are also valid for purpose of enhancing punishment under present conviction).

[168] Jones v. State, 564 So. 2d 848, 851 (Miss. 1990) (when circuit court makes release from prison contingent upon payment of fine, court must follow statutory requirement of MISS. CODE ANN. § 99-19-20(2) (Supp. 1990), to include making inquiry and finding as to whether defendant is in fact able to pay fine); Pugh v. State, 563 So. 2d 601, 604 (Miss. 1990) ("erroneous-release" doctrine, which allows erroneously released inmate to receive credit for time spent at liberty, is inapplicable where inmate was not actually "released" as result of official's miscomputation or inadvertance); Mitchell v. State, 561 So. 2d 1037, 1039 (Miss. 1990) (sentencing authority of circuit court is provided for under MISS. CODE ANN. § 97-3-79 (1972); granting or denial of parole under MISS. CODE ANN. § 47-7-3 (Supp. 1990) is exclusive responsibility of state parole board, and circuit court may not re-sentence under parole statute).

[169] 573 So. 2d 657 (Miss. 1990).

[170] *Turner*, 573 So. 2d at 675. Turner shot and killed Elizabeth Blakely during the armed robbery of the "Forget Me Not" grocery in Summit, Mississippi. *Id.* at 661. After

The Mississippi Supreme Court held, based primarily on principles of due process and fundamental fairness,[175] that the jury should have been informed of Turner's ineligibility for parole.[176] The court further stated that conducting the sentencing phase before a defendant's habitual offender status has been determined leaves the defendant's eligibility for parole uncertain[177] and thus prevents the jury from considering evidence relevant in deciding whether to impose either the death penalty or a life sentence.[178] Moreover, finding no authority empowering a circuit court judge with discretion to decide the order for conducting post-conviction phases,[179] the court ruled that in future

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ransacking the building for valuables, Turner and his accomplice took Blakely's car keys, house keys, and purse and went next door to her home searching for more valuables. *Id.* Turner and his accomplice then wrapped Blakely's body in a blanket, placed it in the trunk of her car, and drove to Chicago where they were arrested seven days later. *Id.* At that time, Chicago police found Blakely's body in the trunk of her car. *Id.*

[171] *Id.*

[172] *Id.* at 661.

[173] *Id.* MISS. UNIF. CRIM. R. CIR. CT. PRAC. 6.04 (1982), sets forth the post-conviction procedure as where the "defendant is convicted . . . on the principle charge, a hearing . . . without the jury will then be conducted on the previous convictions."

[174] *Turner*, 573 So. 2d at 673. Turner assigned on appeal a total of 22 errors by the trial court in the guilt and sentencing phases of the trial. *Id.* The preclusion of evidence of Turner's habitual offender status during sentencing was the only asserted error the court held as reversible error. *Id.* at 673.

[175] *Id.* The court, citing Jurek v. Texas, 428 U.S. 262 (1976), stated that is was an "essential" requirement of due process that juries have before them "all possible relevant information about the individual defendant whose fate it must determine." *Turner*, 573 So. 2d at 674 (citing *Jurek*, 428 U.S. at 276).

[176] *Turner*, 573 So. 2d at 675.

[177] *Id.* at 674. The court concurred with the State's argument that when the sentencing phase is conducted first, information concerning a defendant's eligibility for parole would be "totally speculative at the time of sentencing" and it should be withheld from the jury in accordance with substantive case law. *Id.* at 674-75.

[178] *Id.* at 675.

[179] *Id.* at 675. Citing MISS. UNIF. CRIM. R. CIR. CT. PRAC. 6.04 (1982) (delineating post-conviction procedure) and MISS. CODE ANN. §99-19-101 (Supp. 1990) (delineating procedure for sentencing phase of capital murder trial), the court stated that it found no

cases, the status phase must be conducted prior to the sentencing phase.[180]

B. Recidivism

In *Kolb v. State*,[181] the court addressed the phrase "charges separately brought" and determined that the circuit court did not err in relying on two prior Nebraska convictions in determining John Daniel Kolb's habitual offender status.[182] The court held that since the two burglaries occurred on different dates and at different places,[183] the presentation of the charges as separate counts of the same information in no way merged the charges so as to disqualify them as "charges separately brought" under the habitual offender statute.[184]

Along the same line, in *Pittman v. State*,[185] the court upheld the habitual offender portion of Bobby Lee Pittman's burglary conviction.[186] The court held that Pittman's two prior burglary convictions satisfied the requirement that two prior felony convictions arise out of "separate incidents at different times"[187] despite the fact that the bur-

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justification for conducting the sentencing phase prior to the status phase. *Turner*, 573 So. 2d at 675.

[180] *Turner*, 573 So. 2d at 675. The court reasoned that the "total speculativeness" of a defendant's status during sentencing could be eliminated "without undue inconvenience" if the hearing on the status phase was conducted prior to the sentencing phase. *Id.* The court noted additionally that the chances of an habitual offender sentenced to life without parole successfully challenging a prior felony or the governor granting a reprieve or pardon for a prior felony were "infinitesimal" and did not inhere a substantial element of speculativeness where the habitual offender status is determined prior to sentencing. *Id.* at 673 n. 7.

[181] 568 So. 2d 288 (Miss. 1990).

[182] *Kolb*, 568 So. 2d at 289. In imposing a sentence of ten years imprisonment on Kolb for his conviction of sexual battery and as an habitual offender, the trial court relied on two prior burglary convictions Kolb had incurred in Lancaster County, Nebraska. *Id.* at 288.

[183] *Id.* at 289. The first burglary occurred on December 14, 1974, at a business known as Norman's Interiors in Lincoln, Nebraska, and the second burglary occurred on January 26, 1975, at the State of Nebraska Historical Society also in Lincoln, Nebraska. *Id.* at 288. Both charges, however, were presented against Kolb as two separate counts of a single information, and Kolb entered a plea of guilty to each charge. *Id.*

[184] *Id.* at 289. The court reasoned that the prosecution was still required to prove every element of each charge and, further, that had Kolb not entered guilty pleas, the charges would likely have been severed for trial. *Id.*

[185] 570 So. 2d 1205 (Miss. 1990).

[186] *Pittman*, 570 So. 2d at 1207. Pittman was convicted of the burglary of Cohen's Store in Grenada, Mississippi, and was sentenced as an habitual offender to seven years imprisonment without parole. *Id.* at 1205.

[187] *Id.* at 1207. Pittman was previously convicted for the burglaries of both the Car-

glaries occurred on the same day and the schools burglarized were geographically close to each other.[188] The court pointed to a possible weakness in the text of section 99-19-81 of the Mississippi Code, in that it fails to specify how distant in time the prior criminal acts must be from one another.[189] However, the court, basing its decision on judicial precedent[190] and on the separate nature of the schools,[191] held the burglaries sufficiently separate so as to satisfy the habitual offender requirement.[192]

Specific Offenses and Statutes

The Mississippi Supreme Court in 1990 handed down several decisions in 1990 concerning specific offenses and statutes which addressed: the requisite elements of possession of cocaine with the intent to distribute,[193] the elements of knowingly and intentionally possessing a

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rie Dotson Elementary School and the Willia Wilson Elementary School in Grenada, Mississippi. *Id.* at 1205. Both prior convictions arose out of events occurring on February 13, 1987. *Id.*

[188] *Id.* at 1206. The two schools were connected by a common walkway, shared a common auditorium and cafeteria, and were surrounded by a single all-inclusive chain link fence. *Id.* In fact, testimony at trial indicated that at their nearest points, the two schools were no farther apart than "twenty-five yards, at the most." *Id.* Although the two schools had different administrators, each was ultimately owned and operated by the Grenada Municipal Separate School District. *Id.*

[189] *Id.* at 1206. The court stated that the requirements of separate incidents and different times "border on redundancy" and that the difference in time was central in determining whether two offenses qualify under the habitual offender statute. *Id.* As such, the court held that in order for behavior to be considered "habitual," the events should be sufficiently separate so that "the offender's criminal passions may have cooled so that he has time to reflect" before committing another criminal act, rather than an offender's commission of two offenses in "rapid succession" which does not suggest the same "repetitiveness of criminal design." *Id.*

[190] *Id.* at 1207. The court cited Nicolau v. State, 534 So. 2d 168 (Miss. 1988), Jackson v. State, 518 So. 2d 1219 (Miss. 1988), and Burt v. State, 493 So. 2d 1325 (Miss. 1986), as authority for holding that prior convictions arising out of incidents occurring on the same day may be "separate incidents at different times" within the meaning of Miss. Code Ann. §99-19-81 (Supp. 1990). *Pittman*, 570 So. 2d at 1207.

[191] *Pittman*, 570 So. 2d at 1207. The court reasoned that regardless of how rapidly in succession Pittman may have burglarized the two schools, they are in fact separate, and the court would still be compelled to hold these "separate incidents at different times." *Id.*

[192] *Id.* In a dissenting opinion, Justice Blass concluded that the defendant's prior convictions did not arise out of separate incidents at different times and encouraged the court to re-examine its own interpretation of the habitual offender statute rather than the legislative draftsmen. *Id.* at 1207.

[193] Stringer v. State, 552 So. 2d 796 (Miss. 1990) (viewing evidence in light most

controlled substance,[194] the law of entrapment,[195] criminal contempt,[196] receiving stolen property[197] and the crime of accessory before the fact.[198]

In the case of *Evans v. State*,[199] the Mississippi Supreme Court addressed the State's burden of proof in a charge of manslaughter by culpable negligence.[200] The defendant's vehicle struck the rear of a pickup truck stalled on a highway and killed two men attempting to

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favorable to prosecution court stated that reasonable juror could not find beyond reasonable doubt that defendant possessed drugs with intent to distribute).

[194] Campbell v. State, 566 So. 2d 475 (Miss. 1990) (where defendant had neither control of premises nor actual possession of substance, state had to prove connection of cocaine to defendant); Fultz v. State, No. 89-0380 (Miss. Dec. 12, 1990) (where defendant was in dominion over marijuana, there must be additional incriminating circumstances when defendant is not owner of premises or in exclusive possession of premises for purposes of proving constructive possession).

[195] Tanner v. State, 566 So. 2d 1246 (Miss. 1990) (supply-and-buy sale consistently viewed as falling within the affirmative defense realm of entrapment).

In Daniels v. State, 569 So. 2d 1174 (Miss. 1990), the defendant asserted the defense of entrapment on appeal from a conviction of the sale of cocaine. *Id.* In the case the defendant was supplied with money by a narcotics agent to purchase cocaine from an individual on two separate occasions and as a result of the renumeration for these transactions, the defendant was arrested and charged with the sale of a controlled substance. *Id.* The court, stating that certain unanswered questions made the case troubling, noted that the sellers were either working with the narcotics agent or acting on their own. *Id.* at 1176. The court found that if the seller were involved with the agents, then the case clearly warranted an acquittal based on the defense of entrapment. *Id.* The court analogized the question of the seller's role to requiring under certain circumstances the state to produce all law enforcement officer witnesses to a confession. *Daniels*, 569 So. 2d at 1176 (citing Peden v. Sate, 425 so. 2d 1356, 1358 (Miss. 1983); Scott v. State, 382 So. 2d 1071 (Miss. 1980); Agee v. State, 185 So. 2d 671 (Miss. 1966)). The court held that if the seller had no connection with the narcotics agent, this fact could have been simply testified to before the jury. *Daniels*, 569 So. 2d at 1176. Since the role of the seller of the cocaine was undetermined, the Mississippi Supreme Court reversed and remanded the conviction. *Id.* at 1177.

[196] Lawson v. State, No. 07-59378 (Dec. 12, 1990) (despite defendant's attempts to contact judge, his allegations of hearing disability and his claim that he failed to comprehend order prohibiting him from conversing with members of jury court held defendant in contempt for conversing with juror).

[197] Lewis v. State, No. 07-59278 (Dec. 19, 1990) (mere possession alone is not adequate to prove receipt or purchase of property with knowledge it had been stolen).

[198] Turner v. State, No. 89-0842 (Dec. 27, 1990) (it is not necessary to show control over substance or personal profit from sale to prove accessory before fact; sufficient to show defendant aided and abetted sale).

[199] 562 So. 2d 91 (Miss. 1990).

[200] *Evans*, 562 So. 2d at 92. The court also addressed the offense of negligently killing another while under the influence of intoxicating liquor as found in MISS. CODE ANN. § 63-11-30 (Supp. 1987). *Evans*, 562 So. 2d at 96-97.

move the truck.[201] The defendant was later convicted of manslaughter by culpable negligence in light of specific evidence that the defendant was intoxicated at the time of the accident.[202] The Mississippi Supreme Court initially set forth the necessary elements for finding manslaughter by culpable negligence under Mississippi law.[203] The court ruled that in order for the influence of alcohol to be a factor in showing criminally culpable negligence, it must contribute proximately both to the establishment of such negligence and to the resultant death.[204] The court also stated that driving under the influence of alcohol must create an "abnormal mental and physical condition which tends to deprive one of the clearness of intellect and control of himself which he would otherwise possess" in order to be a factor in the case.[205] Since no witnesses testified the defendant was driving recklessly or unlawfully prior to the accident, the court ruled that proof of intoxication alone was not sufficient to make the causal connection necessary to meet manslaughter by culpable negligence.[206] The court, however, did hold that the evidence was sufficient to find the defendant guilty of the lesser included offense of negligently killing another while under the influence of intoxicating liquor.[207] The court affirmed the lesser conviction, reversed the manslaughter by culpable negligence conviction and remanded to the trial court for appropriate sentencing.[208]

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[201] *Evans*, 562 So. 2d at 92. On a clear day, Anthony Evans was driving south on a fairly level road when he collided with the truck. *Id.* For some unknown reason, the truck stalled and the two men were in the process of connecting the truck to another truck with a chain when the collision occurred. *Id.* at 92-93.

[202] *Id.* Several officers at the scene attested to the fact that the defendant was intoxicated based on sobriety tests. *Id.* Testimony of an accident reconstructionist gave further support to the case that the defendant was at least negligent. *Id.*

[203] *Id.* at 94. Miss. Code Ann. § 97-3-47 (1972) provides that "[E]very other killing of a human being, by the act, procurement, or culpable negligence of another, and without authority of law, not provided for in this title, shall be manslaughter." *Evans*, 562 So. 2d at 94 (citing Miss. Code Ann. § 97-3-47 (1972)).

[204] *Evans*, 562 So. 2d at 95 (citing Gibson v. State, 503 So. 2d 230, 233 (Miss. 1987)); *see* Atkinson v. State, 392 So. 2d 205, 207 (Miss. 1981) (intoxicated driver had opportunity to avoid collision after danger could be observed); *see also* Downs v. State, 41 So. 2d 19, 21 (Miss. 1949) (conviction reversed when no causal link between drink of liquor and accident).

[205] *Evans*, 562 So. 2d at 95 (citing Cutshull v. State, 191 Miss. 764, 4 So. 2d 289, 291-92 (1941)).

[206] *Evans*, 562 So. 2d at 96. The court noted the evidence showed the defendant was driving at a normal rate of speed in the proper lane prior to the accident. *Id.* The court added that all the state proved was intoxication of the defendant and failed to make the necessary causal connection. *Id.*

[207] *Id.*; *see* Miss. Code Ann. § 63-11-30 (Supp. 1986) (stating necessary elements for conviction under Mississippi's implied consent law of negligently killing another while driving intoxicated).

The Mississippi Supreme Court dealt with the proper interpretation of section 97-37-29 of the Mississippi Code concerning the felony of shooting into an occupied dwelling in the case of *May v. State*.[209] In *May*, the defendant fired a shotgun at the door of a motel and was later convicted of shooting into a building usually occupied by other people.[210] The Mississippi Supreme Court determined that the language in the statute, which states that it is unlawful for any person to shoot "into" any building usually occupied by other people, is not to be accorded a narrow interpretation.[211] The court found that the statute is violated if the missile strikes or enters the exterior of the dwelling or usually occupied building.[212] The court affirmed the conviction noting that in this case many pellets went into the exterior of the door.[213]

POST-CONVICTION RELIEF

The Mississippi Supreme Court determined many cases regarding post-conviction proceedings some of which dealt with: The proper jurisdiction upon remand for a post-conviction petition which does not seek collateral review of the conviction of sentence,[214] the proper avenue of appeal on a post-conviction motion ruling,[215] and the type of pleading required in the post-conviction application to the supreme court for permission to file for post-conviction relief.[216]

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[208] *Evans*, 562 So. 2d at 96. The court stated that the normal procedure where the lesser included offense is found applicable is to remand the case for sentencing on the lesser included offense. *Id.*

[209] 569 So. 2d 1188 (Miss. 1990).

[210] *May*, 569 So. 2d at 1188. The defendant, Bobby May, had lived with Virginia Parker, however, following their separation, they became engaged in a heated argument at the Columbus Motel. *Id.* The defendant obtained a shotgun, went to the room, and shot once at the door which had an aluminum front attachment. *Id.* at 1189.

[211] *Id.*

[212] *Id.* at 1189-90 (citing Ethridge v. Commonwealth, 210 Va. 328, 171 S.E.2d 190 (1969)). The court noted that no Mississippi case law addressed the point. *Id.* at 1189.

[213] *Id.* at 1190. The court also stated that objections to alleged prejudicial prosecutorial comments must be made in order to be preserved for appeal. *Id.* The court added that the trial court's instruction to the jury to disregard any comments not based on the evidence was sufficient to mitigate any prejudicial comments made during closing arguments. *Id.*

[214] Walker v. State, 555 So. 2d 738 (Miss. 1990) (court determined that post-conviction petition to supreme court for writ of habeas corpus, which in no way seeks collateral relief of conviction or sentence, is properly remanded to jurisdiction of conviction pursuant to MISS. CODE ANN. § 11-43-9 (Supp. 1990).

[215] Martin v. State, 556 So. 2d 357 (Miss. 1990). The court explained the jurisdictional directive of section 99-39-7, the Uniform Post-Conviction Collateral Relief Act, and set forth the two circumstances in which the motion for relief under the Act must be filed in the supreme court. *Martin*, 556 So. 2d at 358. According to the court, one occa-

In *Vittitoe v. State*,[217] the court found that MISS. UNIF. CRIM.R. CIR. CT. PRAC. 3.03(3)(B) (amended 1979), mandated that a trial judge advise the defendant of the minimum penalty required by law before the defendant enters his guilty plea.[218] The court explained that this procedure ensures that the guilty plea is "voluntarily and intelligently made."[219] The court stated further in *Vittitoe*, that if the defendant is not advised of the minimum penalty as required, then the defendant may of right withdraw his plea of guilty and enter a plea of not guilty.[220]

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sion exists when the matter is presented originally to the trial court and then is appealed to the supreme court pursuant to section 99-39-25, and the second occasion exists when the prisoner is required to first seek leave of the supreme court to proceed in the lower court. *Martin*, 556 So. 2d at 358.

[216] Jordan v. State, No. 90-M-201 (Dec. 19, 1990) (court determined that application with supreme court for permission to file petition for post-conviction relief requires sworn fact pleading based on personal knowledge, and if it plainly appears from face of motion that movant is not entitled to relief, court may dismiss application outright).

[217] 556 So. 2d 1062 (Miss. 1990).

[218] *Vittitoe*, 556 So. 2d at 1063-64. The appellant, Joseph D. Vittitoe, entered a plea of guilty to a charge of armed robbery. *Id.* at 1063. The court failed to advise Vittitoe of the mandatory three-year minimum sentence in Mississippi for armed robbery before he entered his plea. *Id.* at 1064. Vittitoe was found guilty and sentenced to 25 years imprisonment. *Id.* at 1063. Upon Vittitoe's application for post-conviction relief, the circuit court refused to vacate his plea of guilty. *Id.* at 1065. Rule 3.03(3)(B) provides in pertinent part the following:

> (3) Advice to the Defendant. When the defendant is arraigned and wishes to plead guilty to the offense charged, it is the duty of the trial court to address the defendant personally and to inquire and determine:
>
> * * *
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> B. That the accused understands the nature and consequences of his plea, and the maximum and minimum penalties provided by law; . . . .

MISS. UNIF. CRIM. R. CIR. CT. PRAC. 3.03(3)(B) (amended 1979). The court determined without contradiction that the circuit court did not advise Vittitoe of the mandatory minimum sentence, nor was there evidence that Vittitoe knew of the sentence from any other source. *Vittitoe*, 556 So. 2d at 1065.

[219] *Vittitoe*, 556 So. 2d at 1065. Because Vittitoe was ignorant of the mandatory minimum sentence for armed robbery and stated that he would not have pled guilty had he known this information, the court determined that Vittitoe's plea was not "voluntarily and intelligently made." *Id.* The court stated that the circuit court's failure to comply with Rule 3.03(3)(B) at the plea hearing made Vittitoe's plea involuntary as a matter of law. *Id.*

[220] *Id.* The court reversed the lower court's judgment, restored Vittitoe's plea to not guilty, and remanded the case for further proceedings. *Id.*

In *Freelon v. State*,[221] the court explained that a defendant convicted before April 17, 1984, has three years from that date in which to apply for post-conviction relief and the circuit court may properly deny a petition that does not meet that stated deadline.[222] Thus, if a defendant seeks an out-of-time appeal from a lower court's determination on a petition for post-conviction relief where the petition was already time barred at the time of the filing, the court stated that such an out-of-time appeal "would accomplish nothing."[223]

In *Fair v. State*,[224] the court explained that before an out-of-time appeal is granted, the defendant must demonstrate by a preponderance of the evidence that within the time for giving notice of the appeal he had asked his attorney to appeal and that his attorney, through no fault of the defendant, had failed to make the appeal.[225]

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[221] 569 So. 2d 1168 (Miss. 1990).

[222] *Freelon*, 569 So. 2d at 1169. The appellant, Felix Freelon, pled guilty to the sale of a controlled substance in August, 1977, and was sentenced to four years imprisonment. *Id.* at 1169. In August, 1982, Freelon was convicted again for the sale of a controlled substance and was sentenced to twenty years imprisonment without possibility of parole. *Id.* The sentence was based in part on Freelon's prior conviction. *Id.* On May 22, 1989, Freelon applied for post-conviction relief to set aside the guilty plea entered in August 5, 1977. *Id.* The circuit court denied the relief because the petition was time barred. *Id.* Freelon then applied to the lower court for leave to proceed with an out-of-time appeal arguing that he had never received a copy of the court order of which he seeks an appeal. *Id.* The circuit court denied Freelon's motion without a hearing. *Id.*

[223] *Freelon*, 569 So. 2d at 1169. According to the court, Freelon's appeal was an effort to litigate the underlying claim of whether or not his guilty plea in 1977 was knowingly and voluntarily given. *Id.* The court explained that while under other circumstances a court may grant an out-of-time appeal, in this case, under these facts and circumstances, the denial of the out-of-time appeal motion was proper. *Id.* at 1169-70.

[224] 571 So. 2d 965 (Miss. 1990).

[225] *Fair*, 571 So. 2d at 966. The appellant, John Wesley Fair, was convicted of arson and was sentenced to seven years imprisonment. *Id.* at 965. Fair did not perfect his appeal within 30 days of the sentencing judgment pursuant to MISS. SUP. CT. R. 4 (e). *Id.* On March 28, 1989, Fair applied under the Miss. Unif. Post-Conviction Collateral Relief Act fifty days after the judgment and requested an out-of-time appeal, which was denied by the circuit court. *Id.* The court explained that a defendant who wanted an out-of-time appeal must show that the failure to perfect the appeal timely was through no fault of his own. *Id.* at 967. The circuit court had determined, after hearing the matter extensively, that Fair was fully advised of his right to appeal, had understood his right to appeal, and did nothing to indicate that he wished to appeal until after the time limit had passed. *Id.* The court explained that the sworn waiver, signed by Fair after his attorney had explained the consequences of the waiver statement, "functions in this context as substantial credible evidence that Fair did, in fact, receive contemporaneous advise regarding his right to appeal and that he did knowingly and intelligently waive same." *Id.*

In *Moore v. Ruth*,[226] the court considered the power of the state to revoke parole,[227] and stated that an acquittal in a criminal proceeding does not prevent parole revocation based upon the same charge if the State makes a showing that the defendant actually committed some act violating the terms and conditions of his parole.[228]

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[226] 556 So. 2d 1059 (Miss. 1990).

[227] *Moore*, 556 So. 2d at 1061. The appellant, Eugene Moore, was convicted for murder and sentenced to life imprisonment. *Id.* at 1060. In March, 1977, Moore was released on parole. *Id.* On August 18, 1977, Moore was arrested and charged with rape, but at trial, a jury found him not guilty. *Id.* The parole board revoked his probation, however, as a result of the rape charge. *Id.* Moore repeatedly petitioned for re-release on parole, but his requests were denied. *Id.* Upon Moore's *pro se* petition for a writ of habeas corpus, asserting the continuous denial of reinstatement of parole, the circuit court, *sua sponte*, considered the complaint and dismissed it on its face. *Id.* The lower court further denied Moore's motion to reconsider. *Id.* at 1061. The court explained that the power of the State to revoke parole is much narrower than the broad discretionary authority of the parole board in granting parole. *Id.* The court determined that before a defendant is returned to custody, the State must demonstrate that the defendant had violated the terms and conditions of his parole. *Id.* Although the State does not have to show that the defendant was guilty beyond a reasonable doubt, the State must offer actual proof that the defendant violated the terms of his parole. *Id.* at 1061-62. Thus, the court found that the mere fact of an arrest and charge of a felony was not sufficient in itself to show a violation of parole terms. *Id.*

[228] *Id.* The court determined that although the State might present actual facts to establish a finding that Moore had violated his parole terms even though he was found not guilty, Moore's complaint was sufficient on its face to withstand dismissal for failure to state a claim for relief. *Id.* at 1062. The court held that Moore was entitled to proceed past the pleadings stage. *Id.*

MISCELLANEOUS

I. Family Law

A. *Alimony*

In *Retzer v. Retzer*,[1] the Mississippi Supreme Court provided that where a divorce was granted to the husband based on the wife's adultery, alimony for the wife should be denied.[2] In *Retzer*, the husband filed and was granted a divorce on the ground of adultery.[3] The court stated that any lump sum award of alimony by the husband to the wife was inappropriate where the husband was granted the divorce as a result of the wrong-doing of the wife.[4]

In *Boykin v. Boykin*,[5] the Mississippi Supreme Court held that where an award of alimony caused the receiving spouse to have more disposable income than the paying spouse, the disparity of income alone was insufficient to have the award reduced, absent a showing of an abuse of discretion by the trial judge.[6] In *Boykin*, the wife was granted monthly alimony that provided her with monthly disposable income greater than that of the husband.[7] The court affirmed the award of alimony, ruling that merely because the payments provided the wife with slightly more disposable income than the husband, this disparity was not enough to prove an abuse of discretion.[8]

Additionally, in 1990 the Mississippi Supreme Court addressed the principles of res judicata within the context of a divorce judgment. In *Bowe v. Bowe*,[9] the Mississippi Supreme Court held that principles of res judicata applied to divorce actions, and that an award of support or custody may therefore be modified only upon a showing of a material change in circumstances after the award.[10] In *Bowe*, the judgment merely specified that the husband was required to pay the wife $5,000 in monthly installments of $200 per month until the said indebtedness was paid in full.[11] Subsequently, the parties agreed that the husband had completely discharged the obligation.[12] Thereafter, the wife sued for a portion of the husband's military retirement pension.[13] While it was impossible to determine whether the $5,000 award was an award of alimony, it was clear that the judgment ordered a final settlement of all of the husband's financial obligations to the wife.[14] A final judgment precludes all claims that were or reasonably may have been brought in the original suit under the principles of res judicata.[15] Because lump sum alimony is fixed and irrevocable and may not be changed or modified by either party absent fraud, res judicata precluded any award to the wife of a portion of the husband's military pension.[16]

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[1] No. 89-0589 (Miss. Dec. 12, 1990).

[2] *Retzer*, No. 89-0589, slip op. at 25; *see also* Hodum v. Crumpton, 329 So. 2d 667, 669 (Miss. 1976) (where divorce has been granted to husband on ground of wife's adultery, this court has consistently denied any alimony).

[3] *Retzer*, No. 89-0589, slip op. at 19.

[4] *Id.* at 25.

[5] 565 So. 2d 1109 (Miss. 1990).

[6] *Boykin*, 565 So. 2d at 1110.

[7] *Id.*

[8] *Id.*; *see also* Austin v. Austin, 557 So. 2d 509, 510 (Miss. 1990) (where husband's monthly expenses were greater than wife's annual alimony, her getting job was not sufficient change of circumstance to warrant termination of alimony).

[9] 557 So. 2d 793 (Miss. 1990).

B. Adoption

In 1990, the Mississippi Supreme Court addressed the issue of adoption and grandparent visitation rights. In *Muse v. Hutchins*,[17] the Mississippi Supreme Court held that the Grandparents Visitation Rights Act does not vest visitation rights to grandparents unless one of the adoptive legal parents was a natural parent of the adopted child.[18] In *Muse*, two children were adopted by their paternal grandparents, who in turn severely restricted the visitation rights of the maternal grandparents.[19] Section 93-16-7 of the Mississippi Code provides that: "This chapter shall not apply to the granting of visitation rights to the natural grandparents of any child who has been adopted . . . unless: (a) one (1) of the legal parents of such child is also a natural parent of such child. . . ." The court ruled that the wording of the Grandparents Visitation Rights Act mandated that the judgment denying visitation rights to the maternal grandparents be affirmed.[20]

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[10] *Bowe*, 557 So. 2d at 794-95.

[11] *Id.* at 794.

[12] *Id.*

[13] *Id.*; *see also* Southern v. Glenn, 568 So. 2d 281, 284 (Miss. 1990) (whether spouse of serviceman has vested right in military retirement pension is governed by law of state of domicile during term of which pension was earned).

[14] *Bowe*, 557 So. 2d at 794-95.

[15] *Id.*

[16] *Id.* at 794-95; *see also* Brown v. Brown, 574 So. 2d 688 (Miss. 1990) (where "agreed final decree" provided for no further alimony except for such rights that may be vested by law as to part of military pension, that decree was final and subsequent passage of FUSFSCPA 10 U.S.C. § 1408 (1982), does not act to vest such rights).

[17] 559 So. 2d 1031 (Miss. 1990).

[18] *Muse*, 559 So. 2d at 1033-34.

[19] *Id.* at 1032.

In *Grafe v. Olds*,[21] the Mississippi Supreme Court provided that once parental consent to adopt a child had been given, it may be withdrawn only after a showing of fraud, duress, or undue influence by clear and convincing evidence; with the best interest of the child as a paramount consideration.[22] In *Grafe*, a 16-year-old unwed mother, without consulting with an attorney, signed a consent to adoption.[23] Within two weeks, the mother and the maternal grandmother contested the adoption by attempting to withdraw the consent.[24] With the child's best interest being paramount, the court ruled that the mother's consent was voluntary and could not be withdrawn.[25]

C. Child Support

In *Jellenc v. Jellenc*,[26] the Mississippi Supreme Court offered further guidelines in the determination of child support.[27] Here the court concluded that the statutory amount set for child support is only a guideline.[28] The percentage range of child support set out in MISS. CODE ANN. sections 43-19-101 to -103 (Supp. 1990) is merely a rebuttable presumption.[29] The guidelines are relevant, but such guidelines may not determine the specific need or the specific support required.[30]

In *Brown v. Brown*,[31] the Mississippi Supreme Court provided that a child support decree was subject to future modification as circumstances of the parties change, unless the chancery court specifically declared the payments to be absolute.[32] In *Brown*, the settlement agreement entitled a particular child to one-half of his father's net income as child support.[33] Subsequently, the father sought modification since his salary had doubled since the date of the agreement.[34] The court held that a child support judgment unlike a settlement of property rights, was based on the needs of the child coupled with the ability of the parent to pay, which may vary with future developments.[35]

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[20] *Id.* at 1034.

[21] 556 So. 2d 690 (Miss. 1990).

[22] *Grafe*, 556 So. 2d at 693-94; *see also* Hill v. Smith, 558 So. 2d 854 (Miss. 1990) (there is no statutory right to visitation for natural grandparents of adopted child unless one of adoptive parents is natural parent of child).

[23] *Grafe*, 556 So. 2d at 691.

[24] *Id.* at 692.

[25] *Id.* at 695; *see also* MISS. CODE ANN. § 93-17-7 (Supp. 1990) (no infant shall be adopted when natural parent objects prior to decree of adoption, however parents shall not have right to object if parental rights have been terminated in accordance with MISS. CODE ANN. §§ 93-15-101 to -111 (Supp. 1990)).

[26] 567 So. 2d 847 (Miss. 1990).

[27] *Jellenc*, 567 So. 2d at 847; *see also* Cupit v. Cupit, 559 So. 2d 1035, 1037 (Miss. 1990) (with interest of child being paramount, in determining child support chancellor should consider financial resources and reasonable needs of each parent; and upon considering husband's net income of $793 per month, court determined chancellor's award of $400 per month in child support was obviously excessive).

[28] *Jellenc*, 567 So. 2d at 847.

[29] *Id.*

[30] *Id.* at 848.

[31] 566 So. 2d 718 (Miss. 1990).

D. Child Custody

In 1990, the Mississippi Supreme Court ruled on several decisions concerning child custody. In *Arnold v. Conwill*,[36] the court provided that modification of a divorce decree changing child custody should be denied where no material change in the circumstances of the parent or the child had occured which adversely affected the child.[37] In *Arnold*, custody of a couple's three-year-old child was granted to the mother.[38] The mother in turn allowed the father to care for the child for eighteen months before attempting to regain custody of the child.[39] As a result, the father sought a modification of the divorce decree.[40] The Mississippi Supreme Court held that there must be a substantial change in circumstance, and that this change must have adversely affected the child in question before a divorce decree can be modified as to child custody.[41]

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[32] *Brown*, 566 So. 2d at 720; *see also* Duncan v. Duncan, 556 So. 2d 346, 348 (Miss. 1990) (in absence of contract, requirement of parent to provide child support payments terminates at child's majority).

[33] *Brown*, 566 So. 2d at 719.

[34] *Id.*

[35] *Id.* at 720.

[36] 562 So. 2d 97 (Miss. 1990).

[37] *Arnold*, 562 So. 2d at 99; *see also* Polk v. Polk, 559 So. 2d 1048, 1050 (Miss. 1990) (where chancellor finds no material change in circumstances that adversely affect child's best interest, then change in custody cannot be given); White v. Thompson, 569 So. 2d 1181, 1183 (Miss. 1990) (in order to overcome presumption that child's best interest is served by staying with his/her parents, there must be clear showing that: (1) parent has abandoned the child; (2) conduct of the parent is so immoral as to be detrimental to child, or (3) parent is unfit mentally or otherwise to have custody of his or her child; and adultery of parent may be unwholesome influence and impairment to child's best interest, or it may have no affect).

[38] *Arnold*, 562 So. 2d at 98-99.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 99. Thus custody remained with the mother. *Id.*; *see also* Stevison v. Woods, 560 So. 2d 176, 180 (Miss. 1990) (split custody of siblings who maintained daily

According to *Mord v. Peters*,[42] when a noncustodial parent has unsupervised visitation right, the custodial parent maintains no right to interfere with those visitation privileges, absent a finding that the visitation is detrimental to the child.[43] In *Mord*, the father filed a complaint alleging that his ex-wife was interfering with his visitation privileges when she prohibited him from taking his children flying in his private airplane.[44] The court concluded that absent a finding that a noncustodial parent's visitation with the child was detrimental, the visitation rights would not be restricted.[45]

The Mississippi Supreme Court in *McManus v. Howard*,[46] evaluated a child custody agreement which stipulated to conditions that would cause a change in child custody.[47] The court held that such agreements are void because they would force the court to surrender its jurisdiction.[48] In *McManus*, the parties executed a child custody agreement stipulating that if the mother moved out of the county without the consent of the father, custody would be divested from her and placed in the father.[49] The court held that the agreement was void and against public policy.[50] The court cannot be forced to surrender its jurisdiction concerning conditions that cause a change in custody.[51] While the courts will not rewrite contracts to satisfy the desires of a specific party, other considerations override this rule where the agreement concerns child custody; specifically, the courts must not accord to contractual agreements that turn the inquiry away from the best interest of the child.[52]

In *Curtis v. Curtis*,[53] the Mississippi Supreme Court held that where a foreign divorce and custody decree was valid, such decree

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contact, coupled with move of 4500 miles away by one parent justified holding that best interest of child required change in custody in order to keep children together).

[42] 571 So. 2d 981 (Miss. 1990).

[43] *Mord*, 571 So. 2d at 986; *see also* Newsom v. Newsom, 557 So. 2d 511, 516 (Miss. 1990) (chancellor has power to restrict child visitation where circumstances present appreciable danger cognizable under Mississippi law).

[44] *Mord*, 571 So. 2d at 981.

[45] *Id.* at 984.

[46] 569 So. 2d 1213 (Miss. 1990).

[47] *McManus*, 569 So. 2d at 1214.

[48] *Id.* at 1216; *see also* Bell v. Bell, 572 So. 2d 841, 845-46 (Miss. 1990) (where child custody agreement stipulated that child must reside in particular community until majority, such agreement was contrary to child's best interest and was unenforceable).

[49] *McManus*, 569 So. 2d at 1214.

[50] *Id.* at 1216.

[51] *Id.*

[52] *Id.*

[53] 574 So. 2d 24 (Miss. 1990).

should not be modified by a Mississippi court unless the Mississippi court obtained proper jurisdiction and both parties had "significant connections" with the state.[54] In *Curtis*, a Mississippi chancery court modified a Utah custody decree and protective order, and the Mississippi Supreme Court ruled that the modification was improper based on a lack of jurisdiction and significant connections.[55] Additionally, the period of time that the child lived in Mississippi was a direct result of the improper modification of the Utah custody agreement, and such an involuntary residence did not constitute significant connections.[56] The chancery court is permitted to assume temporary emergency jurisdiction; however, such jurisdiction ends when the danger to the child ends, and in no way gives the court jurisdiction to permanently modify a foreign decree.[57]

E. Miscellaneous

In *Newell v. Hinton*,[58] the Mississippi Supreme Court stated that rules applicable to the construction of written contracts are applicable in construing ambiguous divorce judgments and property settlements; furthermore, the court should gather the intent of the parties and render its clauses harmonious with such intent.[59] In *Hinton*, the property settlement agreement stated that the husband would receive a 1981 Ford pickup truck and was responsible for such indebtedness, and the wife received a 1984 Ford Mustang and was responsible for its indebtedness.[60] Prior to the divorce, the couple sold the 1984 Mustang, which Ford Motor Credit Corp., subsequently repossessed with a $3,972 deficiency.[61] The court ruled that it was obvious that the parties intended to reference the 1985 Mustang when they drafted the property settlement agreement.[62] Consequently, the wife was liable for the indebtedness resulting from the 1985 Mustang.[63]

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[54] *Curtis*, 574 So. 2d at 31; *see also* Jackson v. Terrill, 562 So. 2d 1271, 1274 (Miss. 1990) (where foreign court had jurisdiction over matter under Uniform Child Custody Jurisdiction Act and issued order concerning such matter, Mississippi trial court must give full faith and credit to decree).

[55] *Curtis*, 574 So. 2d at 31.

[56] *Id.* at 30.

[57] *Id.* at 28.

[58] 556 So. 2d 1037 (Miss. 1990).

[59] *Hinton*, 556 So. 2d at 1042; *see also* Webster v. Webster, 566 So. 2d 214, 215 (Miss. 1990) (where settlement agreement does not provide for eventuality that later occurs, court interpreting agreement must attribute to its provisions coherent and reasonable scheme in light of entire document).

[60] *Hinton*, 556 So. 2d at 1040.

[61] *Id.*

[62] *Id.* at 1042.

Ex rel. M.A.C. v. Harrison County Family Court,[64] the Mississippi Supreme Court held that pursuant to MISS. CODE ANN. section 43-23-303(3) (1972), parents have a statutory right to be present during the interrogation of their child; furthermore, a violation of that right warrants reversal of the subsequent conviction and the granting of a new trial.[65] In *M.A.C.*, police officers refused to allow the juvenile's mother to be present during an interrogation, in which the juvenile confessed to a crime.[66] The court noted that the statute expressly required that the parent be invited to be present during any questioning of a juvenile.[67]

In *Overstreet v. Merlos*,[68] the court held that viable claims of alienation of affection were not retroactively abolished upon divorce.[69] In *Overstreet*, the ex-husband filed a complaint against the defendant for alienation of affection of his wife.[70] The court summarily dismissed the argument that the cause of action of alienation of affection should be abolished and concluded that even though the cause of action was antiquated, it was supported by precedent by which the court was bound.[71]

II. INSURANCE

In 1990, the Mississippi Supreme Court handed down decisions in thirteen cases involving insurance.[72] Eight of these involved demands for punitive damages either in the case heard before the supreme court[73] or in the underlying action preceding the opinion of the Mississippi Supreme Court.[74] Two of these cases will be discussed textually.[75] There were two cases of first impression involving insurance decided by the Mississippi Supreme Court in 1990,[76] and these cases will also be discussed textually. The remainder of the cases developed or simply followed existing law.

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[63] *Id.*

[64] 566 So. 2d 472 (Miss. 1990).

[65] *M.A.C.*, 566 So. 2d at 474; *see also Ex rel. S.B. v. State*, 566 So. 2d 1276, 1278 (Miss. 1990) (review of adjudication of delinquency involving loss of freedom to child, requires state establish beyond reasonable doubt each and every essential element of charge).

[66] *M.A.C.*, 566 So. 2d at 473.

[67] *Id.* at 474.

[68] 570 So. 2d 1196 (Miss. 1990).

[69] *Overstreet*, 570 So. 2d at 1197.

[70] *Id.* at 1197.

[71] *Id.* at 1198.

[72] Gregory v. Continental Ins. Co., No. 07-59256, (Miss. Dec. 27, 1990) (discussed textually); A&S Trucking Co. v. First Gen. Ins. Co., No. 07-59168 (Miss. Dec. 19, 1990) (discussed textually); Harvey-Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13 (Miss. 1990) (discussed textually); McCann v. Gulf Nat'l Life Ins. Co., 574 So. 2d 654 (Miss. 1990) (insurance company may be held liable for punitive damages for wrongful acts by its agents when insurance company does not investigate to discover these acts and disclaims liability based on false information furnished by its agents); Papa v. Mississippi Farm Bureau Casualty Ins. Co., 573 So. 2d 761 (Miss. 1990) (discussed textually); Thiac v. State Farm Mut. Auto Ins. Co., 569 So. 2d 1217 (Miss. 1990) (court held

A. Automobile Insurance

In *A&S Trucking Co. v. First General Insurance Co.*,[77] a case of first impression, the court had to decide whether a "temporary substitute automobile" covered under the liability portion of the policy was the same as a "replacement vehicle" covered under the collision portion.[78] A&S Trucking Company had leased three Kenworth tractors from Lend-Lease, a division of National Car Rental System, Inc.[79] The

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that for purposes of determining whether tortfeasors vehicle is underinsured, guest passenger may stack only guest's own UM coverage and that of host vehicle, not host driver, for comparison with liability limits of tortfeasor's vehicle); Lawler v. Government Employee Ins. Co., 569 So. 2d 1151 (Miss. 1990) (policy provision requiring insured give notice of accident to insurance company held applicable to UM coverage; whether notice is given "as soon as practicable" and whether insurance company is prejudiced are questions of fact not suitable for summary judgment); Roberts v. State Farm Mut. Auto Ins. Co., 567 So. 2d 1193 (Miss. 1990) (insurance company tendered payment for medical bills four years after they were submitted by insured; court deferred to jury's finding that insured was not entitled to compensatory or punitive damages); Minnesota Mut. Life Ins. Co. v. Larr, 567 So. 2d 239 (Miss. 1990) (discussed textually); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172 (Miss. 1990) (normally insured must receive directed verdict on issue of contract damages before punitive damages may be submitted to jury); State Farm Fire & Casualty Co. v. Simpson, 564 So. 2d 1374 (Miss. 1990) (discussed textually); Bell v. Parker, 563 So. 2d 593 (Miss. 1990) (discussed textually); Anderson v. State Farm Mut. Auto Ins. Co., 555 So. 2d 733 (Miss. 1990) (discussed textually).

[73] Gregory v. Continental Ins. Co., No. 07-59256 (Miss. Dec. 27, 1990); A&S Trucking Co. v. First Gen. Ins. Co., No. 07-59168 (Miss. Dec. 19, 1990); Harvey-Latham Real Estate v. Underwriters at Lloyd's, 574 So. 2d 13 (Miss. 1990); McCann v. Gulf Nat'l Life Ins. Co., 574 So. 2d 654 (Miss. 1990); Roberts v. State Farm Mut. Auto Ins. Co., 567 So. 2d 1193 (Miss. 1990); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172 (Miss. 1990); Simpson v. State Farm Fire & Casualty Co., 564 So. 2d 1374 (Miss. 1990).

[74] Larr v. Minnesota Mut. Life Ins. Co., 884 F.2d 892 (5th Cir. 1989) (case presented certified question to Mississippi Supreme Court).

[75] *See infra* notes 52-64 and accompanying text.

[76] *See infra* notes 6-24, 65-71 and accompanying text.

[77] No. 07-59168 (Miss. Dec. 19, 1990).

[78] *A&S Trucking Co.*, No. 07-59168, slip op. at 6-7.

[79] *Id.* at 3.

lease required A&S Trucking Company to maintain liability and collision insurance on these three tractors.[80] A&S Trucking Company took possession of the tractors, tried them out, and returned them to Lend-Lease for clean-up and to have decals and lettering placed on the tractors.[81] Lend-Lease allowed A&S to take possession of three Peterbilt tractors as temporary substitutes for the Kenworths.[82] A&S was to return the Peterbilts to Lend-Lease when the Kenworths were ready to be put in service.[83] One of the Peterbilts was involved in an accident while Lend-Lease was still working on the Kenworths.[84] The truck was a total loss.[85] First General paid the liability claim arising from the accident but refused to pay the collision claim.[86] The liability portion of First General's policy extended liability coverage to any person using a "temporary substitute automobile" with the permission of the named insured, and defined a temporary substitute automobile as one "temporarily used with the permission of the owner as a substitute for an owned automobile when withdrawn from normal use for servicing or repair . . . ."[87] The collision (physical damage) coverage portion of the policy defined a "covered automobile," *inter alia* as one which "replaces a described covered automobile . . . ."[88]

A&S and Lend-Lease contended that the Peterbilt involved in the accident was a replacement for one of the Kenworths listed on the policy and that therefore it should be covered for the total collision loss.[89] First General denied the collision loss contending that while the Peterbilt was indeed a "temporary substitute" for one of the Kenworths and was covered for liability, it did not "replace" one of them as the Kenworths were merely temporarily withdrawn from A&S' use while they were being serviced.[90] The court phrased the question involved as "whether the replacement" in contemplation and in actuality was 'temporary' or permanent."[91] The court stated that the definitions of "replacement vehicle" and "temporary substitute" have been distinguished both on factual and legal grounds in a number of cases, although none had been decided in Mississippi.[92] Relying on precedent from nearby states,[93] the Mississippi Supreme Court held that the wrecked Peterbilt was not a replacement vehicle but was a temporary substitute vehicle as it was not intended to permanently replace the Kenworth tractor insured on the policy.[94] Therefore, collision coverage did not extend to the wrecked Peterbilt.[95]

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[80] *Id.*

[81] *Id.*

[82] *Id.* at 4.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 7.

[88] *Id.* at 8.

[89] *Id.* at 1-2.

[90] *Id.* at 6.

[91] *Id.* at 7.

In *Anderson v. State Farm Mutual Automobile Insurance Co.*,[96] the Mississippi Supreme Court refused to amend the Uninsured Motorist Act by interpretation so as to allow recovery for injuries allegedly caused by an unknown driver whose vehicle had made no physical contact with the insured's vehicle.[97] The court rejected the plaintiff's argument that the purpose of the statutory language requiring "actual physical contact" was to prevent fraudulent claims and that the requirement should be ignored where eyewitness testimony proved the involvement of the unknown driver.[98] The court held that the meaning of the phrase "actual physical contact" was "within the core of certainty" of the legislative enactment,[99] and that the court would "enforce the rule as it is written."[100] Thus, recovery under the uninsured motorist coverage was denied.[101]

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[92] *Id.* at 9.

[93] *Id.* at 9-11 (citing Allstate Ins. Co. v. Estate of Johnson, 539 F. Supp. 421 (W.D. Ark. 1982) (policy clearly defined replacement automobile as one that permanently replaced an automobile removed from service and insured's vehicle was not covered as it did not meet that description); Providence Wash. Ins. Co. v. Hawkins, 340 S.W.2d 874 (Tex. 1960) (vehicle temporarily substituted while insured vehicle underwent repairs was not "replacement vehicle" which was covered under physical damage portion of policy); and Kelly v. State Farm Mut. Auto. Ins. Co., 256 F. Supp. 978 (E.D. Tenn. 1966) (replacement vehicle is one ownership of which has been acquired after issuance of policy and which replaces vehicle described in policy that has been disposed of or is incapable of further service at time of replacement)).

[94] *A&S Trucking*, No. 07-59168, slip op. at 12.

[95] *Id.* at 11-12. The court pointed out that the Kenworth insured on the policy still existed and had it been damaged, First General would have been liable for the damage to it under the terms of the policy. *Id.* at 8-9. The court found that since the liability portion of the policy clearly covered "temporary substitute" automobiles, the insurer must have set the premium accordingly. *Id.* at 12. Yet since the physical damage coverage under the policy clearly excluded "temporary substitute" automobiles and only covered "replacements", the insurer could not equitably be forced to assume the risk of insuring two vehicles for the price of one when its policy clearly indicated it did not assume that risk. *Id.* at 11-12.

[96] 555 So. 2d 733 (Miss. 1990).

[97] *Anderson*, 555 So. 2d 733-34. Anderson's son was driving a pickup insured on her State Farm policy when he attempted to pass a vehicle in front of him whose driver was unknown. *Id.* at 733. For some reason Anderson's son lost control of his vehicle which then went off the road, overturned, and fatally injured her son. *Id.* The parties stipulated that there was no actual physical contact between Anderson's pickup and the vehicle driven by the unknown driver. *Id.* The Uninsured Motorist Act defines "uninsured motor vehicle" as including "[a] motor vehicle of which the owner or operator is unknown; provided that in order for the insured to recover . . . actual physical contact must have occurred between the motor vehicle owned or operated by such unknown person and the person or property of the insured." MISS. CODE ANN. § 83-11-103(c)(v) (Supp. 1990).

In *Papa v. Mississippi Farm Bureau Casualty Insurance Co.*,[102] which presented a question similar to that of the *Anderson* case, the Mississippi Supreme Court held that policy wording which provided medical benefits for an insured "struck by any automobile" extended to provide medical payments coverage for "injuries which were proximately caused by the negligence of an automobile driver."[103] The court relied on previous authority to liberally construe the policy in favor of the insured and upon authority from 42 *American Jurisprudence (Second)* to reach its holding.[104] While the authority cited for construction of the policy provision[105] and the facts of the particular case seem to indicate that "imminent danger"[106] is an essential element for recovery under such a construction of the policy, the court simply held that the coverage extended to injuries "proximately caused by the negligence of an automobile driver."[107] It will remain for further cases to demonstrate whether the more liberal wording of the court's opinion will have any practical effect upon the insured's asbility to recover medical payments.[108]

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[98] *Anderson*, 555 So. 2d at 734.

[99] *Id.*

[100] *Id.* at 735.

[101] *Id.*

[102] 573 So. 2d 761 (Miss. 1990).

[103] *Papa*, 573 So. 2d at 764. Papa's injuries were received "when he jumped off a bridge to avoid being struck by a vehicle negligently driven by Charles Mahan." *Id.* at 761-62. The parties stipulated that the Mahan vehicle had not actually "struck" Papa and the circuit court ruled that "[i]n light of this ['unambiguous'] provision . . . of the . . . insurance . . . it is clear that the . . . policies . . . do not cover the medical bills . . . ." *Id.* at 762.

[104] *Id.* at 763 (citing Southern Farm Bureau Cas. Ins. Co. v. Brewer, 507 So. 2d 369, 372 (Miss. 1987) (where policy was capable of two meanings, meaning and construction most favorable to the insured should be applied); 42 Am. Jur. 2d *Insurance* § 632 (1982) (proper construction of policy provision "struck by an automobile" does not necessitate physical contact of insured with automobile as a prerequisite to recovery)).

[105] *See* cases cited *supra* note 22.

[106] *Id.*

[107] *Papa*, 573 So. 2d at 764.

[108] The court also decided Roberts v. State Farm Mut. Auto. Ins. Co., 567 So. 2d 1193 (Miss. 1990). In *Roberts*, the court upheld a jury verdict against the insured on her claims for actual and punitive damages resulting from the insurance company's alleged

B. Fire Insurance

In *Simpson v. State Farm Fire & Casualty Co.*,[109] the court held that State Farm was not entitled to any set-off for its payment to the mortgagee for a total fire loss,[110] even though a copy of State Farm's draft by which it had paid the mortgage company was introduced into evidence.[111] The court reasoned that the set-off could not be allowed since the note and deed of trust were not before the court.[112] The court acknowledged that the insurance company had an independent contractual obligation to pay the mortgage company upon submission of its proof of loss.[113] The court pointed out, however, that the insurance company after its payment to the mortgagee was entitled only to receive an assignment of the note and deed of trust from the original mortgagee and gained no greater rights than those of the original mortgagee.[114] The court explained that by attempting to gain a set-off of the Simpson claim on account of its payment to the mortgagee, State Farm had, in effect, attempted to accelerate the note and deed of trust without showing default on the part of the Simpsons.[115] Without evidence of the note, deed of trust and default before the court, it was improper for the trial judge to allow the set-off.[116] Therefore, the Mississippi Supreme Court reversed and rendered this portion of the judg-

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refusal to pay a medical payments claim, even though the trial court awarded the insured a jnov for the full amount of the medical payments. *Id.* at 1197.

[109] 564 So. 2d 1374 (Miss. 1990).

[110] *Id.* at 1380-81. *Simpson* was a case with a history. The Simpson home burned on August 16, 1978. *Id.* at 1375. In 1980, Simpson and her husband filed suit against State Farm and following a jury trial, the jury awarded contractual damages, compensatory damages and punitive damages. *Id.* On appeal the Mississippi Supreme Court reversed and rendered the punitive and compensatory damages award and remanded the claim on contractual damages for a retrial. *Id.* On retrial, the jury awarded policy limits of $50,960 to Simpson which was later reduced to $22,876.25 due to credit given State Farm for payment to the mortgagee on the Simpsons' home. *Id.*

[111] *Id.* at 1381-82.

[112] *Id.* at 1382.

[113] *Id.* at 1382 (citing Tallman Fed. Sav. & Loan Ass'n v. American States Ins. Co., 468 So. 2d 868, 872-73 (Miss. 1985) (under settled law following fire loss to insured property, insurance company had obligation to pay mortgagee amount of debt upon demand)).

[114] *Id.* at 1382 (citing Ford v. White, 495 So. 2d 494, 497 (Miss. 1986) (assignee merely stands in shoes of assignor and assignee's rights can rise no higher than assignor's); Indiana Lumberman's Mut. Ins. Co. v. Curtis-Mathis Mfg. Co., 456 So. 2d 750, 754 (Miss. 1984) (same)).

[115] *Id.* at 1382.

[116] *Id.*

ment.[117] The court also rejected the assignment of error by Simpson that the trial court had erred in refusing to allow retrial of the punitive and compensatory damage claim under exceptions to the "law of the case" doctrine.[118] The court found that the issues fell within neither the "new evidence" exception nor the "manifest injustice" exception.[119] The court declined to create an exception in the present case for a substantial change in the governing law following trial of the first case and prior to trial of the second case.[120] The court found that there had actually been no substantive change in the punitive damage or compensatory damage law in the interval between the first and second *Simpson* trials.[121] The court did comment, however, that "the courts of this state have not yet recognized this exception to the law of the case doctrine . . . . We discuss it but save the adoption of this exception for another case."[122] It, therefore, appears that the court may well adopt a "substantive change" exception to the "law of the case" doctrine when the right fact situation is presented to the court.

In *Gregory v. Continental Insurance Co.*,[123] the Mississippi Supreme Court held that "an insurance carrier's duty to promptly pay a legitimate claim does not end because a lawsuit has been filed against it for nonpayment."[124] The court pointed out that Continental had a valid defense under the terms of the policy due to the failure of the insured to submit written documentation of her loss.[125] However, the court also pointed out that the trial court had held that Continental had waived this defense as it had not been asserted in either Continental's answer or argument before the trial court.[126] The court pointed out that Continental tendered payment for Mrs. Gregory's loss in the amount of $1,075.37.[127] The payment had been tendered almost two years after the loss had occurred and over a year after suit had been filed, yet was tendered at a time when Mrs. Gregory had still not furnished documentation for the loss claimed under the policy.[128] The court noted that it did not understand why Continental made the payment, but having done so, the insurance company was obligated to explain why it had delayed for over a year after suit was filed before making the payment.[129] Further, the court pointed out that at trial, Continental had agreed to entry of a judgment in the amount of $9,000 without any explanation for the disparity between the previous payment and the agreed judgment.[130] The court commented that under these circumstances it would remand the cause for determination of "the reasonableness of or arguable reason for Continental's conduct after suit was filed."[131] As Continental had not appealed the $9,000 judgment, the remand was for determination of punitive damages by the trial court.[132]

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[117] *Id.*

[118] *Id.* at 1380.

[119] *Id.* at 1377-80.

[120] *Id.* at 1379-80.

[121] *Id.*

[122] *Id.* at 1379.

[123] No. 07-59256 (Miss. Dec. 27, 1990).

[124] *Gregory*, No. 07-59256, slip op. at 13. As the court put it "more bluntly, if you owe a debt the duty to pay does not end when you are sued for nonpayment of it." *Id.* On September 2, 1985, Hurricane Elana caused extensive damage to a golf course and country club owned by Mrs. Gregory. *Id.* at 4. Continental's adjuster and Mrs. Gregory agreed promptly upon the structural damage to the buildings covered by the country club's policy and Continental made prompt payment of the agreed amount of damage. *Id.* There was, however, disagreement between Mrs. Gregory and the insurance company's adjuster as to the amount of loss, if any, payable under the policy's business interruption coverage. *Id.* at 4-5. Mrs. Gregory took the position that business interruption coverage applied for the entire period of time required to clear fallen trees and other debris from the golf course and bring the golf course back into playable condition. *Id.* at 5. The insurance company's adjuster took the position that the business interruption coverage was restricted to the period of time required to repair relatively minor damage to the golf course restaurant and pro shop. *Id.* at 5-6. As of the date of the trial, Mrs. Gregory had not submitted any documentation of the amount she claimed under the policy and, as of the date of argument of the case before the Mississippi Supreme Court, apparently the amount had still not been documented by Mrs. Gregory. *Id.* at 7, 8, 10, app. i.

Post-suit conduct also led to a remand for determination of punitive damages in *Harvey-Latham Real Estate v. Underwriters at Lloyd's*.[133] Where a dispute over policy coverage was resolved shortly before suit was filed on September 19, 1986, but payment was not tendered by the insurance company until August, 1987, the court held that summary judgment for the insurance company on the issue of punitive damages was not proper.[134] The court commented that some reasonable delay after the dispute was resolved and even after suit was filed would have been understandable but that it was "unable to ascertain from the record whether or not Lloyd's had an arguable reason to withhold payment from September 19, 1986, to August, 1987."[135]

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[125] *Id.* at 12.

[126] *Id.* at 8, 13.

[127] *Id.* at 6. The payment was tendered "without prejudice". *Id.* at 6-7.

[128] *Id.* at 4, 6, 11.

[129] *Id.* at 11-12.

[130] *Id.* at 14.

[131] *Id.*

[132] *Id.* at 14-15.

[133] 574 So. 2d 13 (Miss. 1990).

[134] *Harvey-Latham*, 574 So. 2d at 15-16.

C. Life Insurance

In *Bell v. Parker*,[136] a case of first impression, the court affirmed the lower court's ruling that an oral request for change of beneficiary six days prior to the death of the policyholder was effective.[137] Citing Mississippi authority,[138] the court held that Mississippi would follow the majority of courts and accept the "substantial compliance rule",[139] which the court stated as "where an insured evidences an intent to change beneficiaries, and does all (s)he can do to comply with the requirements of the policy, substantial compliance will be found and the change of beneficiaries will be upheld."[140] The court also cited authority supporting its view that insurance cases are difficult to decide and each one must be decided based on its own facts.[141] The court made it clear that this case was decided and the "substantial compliance" rule implemented based upon the particular facts of this case.[142]

In *Minnesota Mutual Life Insurance Co. v. Larr*,[143] the Mississippi Supreme Court, in answer to a certified question from the United

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[135] *Id.* at 16.

[136] 563 So. 2d 594 (Miss. 1990).

[137] *Id.* at 595. Helen Louise Holmes had a massive stroke and passed away on December 2, 1986. *Id.* She had previously designated John Bell as beneficiary on her group life insurance policy. *Id.* Approximately six days before her death she had gone to the office of her employer and asked to change beneficiaries on all of her insurance policies. *Id.* She completed a change of beneficiary form on her accident insurance, showing her children as beneficiaries rather than John Bell. *Id.* There was no form in the office for the group life insurance policy, however, the secretary stated that she would get a form for Mrs. Holmes. *Id.* Unfortunately she died prior to the time that the form was received. *Id.* Bell refused to sign an affidavit giving up his rights to the proceed of the life insurance policy and the life insurance company filed an interpleader action naming Bell and the children and tendering the proceeds of the policy into the court. *Id.*

[138] *Id.* at 597-98 (citing Faulkner v. Faulkner, 192 Miss. 358, 364-65, 5 So. 2d 421, 422 (1942) (where insured submitted written request for change of beneficiary, but insurance company failed to properly endorse change, intent of insured will be given full weight); Gayden v. Kirk, 207 Miss. 861, 867, 43 So. 568, 570 (1949) (where insured does all within his power to have policy is endorsed to designate beneficiary but return of policy prevented by wrongful act of previously named beneficiary, efforts of insured are effective to change beneficiary)).

[139] *Id.* at 598.

[140] *Id.*

[141] *Id.* at 599.

[142] *Id.*

[143] 567 So. 2d 239 (Miss. 1990).

States Court of Appeals for the Fifth Circuit, held[144] that an insurance company may waive an age termination provision in a policy by continuing to accept premiums past the time specified in the termination provision.[145] This is especially true if the company had knowledge of the insured's age while continuing to accept premiums.[146] The Mississippi Supreme Court distinguished *Boult* from *Speed* and its progeny based on the facts of each.[147]

D. *Punitive Damages*

In *Harvey-Latham Real Estate*,[148] Justice Blass, writing an opinion in which seven justices concurred[149] advanced what appeared to be a plea for the legislature to limit punitive damage awards.[150] After discussing the fact that juries are given little or no guidance in determination of the amount of a punitive damage award, and that the Mississippi Supreme Court had, arguably, recognized that punitive damages should be limited,[151] Justice Blass made the following statement:

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[144] *Larr*, 567 So. 2d at 240. In *Larr v. Minnesota Mut. Life Ins. Co.*, 884 F.2d 892, 893 (5th Cir. 1989), the Fifth Circuit had certified the following question to the Mississippi Supreme Court: "Has Boult v. Maryland Casualty Company, 111 F.2d 257 (5th Cir. 1940) been overruled by subsequent Mississippi cases which hold that waiver cannot operate to reform an insurance contract to cover additional subject matter?" *Larr*, 884 F.2d at 893. In *Boult*, the insurance company had issued a policy which stipulated that the insurance did not cover any person over 60 years of age. *Larr*, 567 So. 2d at 241. The company, however, continued to accept premiums from Boult until he was 64 years of age when he died as the result of an accident. *Id.* The insurance company attempted to deny coverage but the Fifth Circuit held that its knowing acceptance of premium after Boult passed the age limit in the policy amounted to a waiver of that provision and that the insurance company was liable for the amount of the policy. *Larr*, 567 So. 2d at 241. In Employer's Fire Ins. v. Speed, 242 Miss. 341, 133 So. 2d 627, 629 (1961), the Mississippi Supreme Court had specifically held that "[w]aiver and estoppel cannot operate so as to bring within the coverage of the policy property, or a loss, or a risk, which by the terms of the policy is expressly excepted or otherwise excluded." *Larr*, 567 So. 2d at 241 (*quoting Larr*, 242 Miss. at 346, 133 So. 2d at 629).

[145] *Larr*, 567 So. 2d at 242. The facts set out in *Larr* indicate that the Larrs had secured credit life insurance through a credit union. *Larr*, 567 So. 2d at 240. Under the terms of the life insurance policy, life insurance did not extend past age 70. *Id.* At the time the insurance was taken out, Mr. Larr was 69 and the life insurance company continued to accept premiums withdrawn from the Larrs' account by the credit union for two months after he reached age 70 and until his death on February 5, 1987. *Id.* Following a claim by the beneficiary on the policy, the insurance company refused payment because of the age termination provision in the policy. *Id.*

[146] 44 AM. JUR. 2d *Insurance* 1649 (1982).

[147] *Larr*, 567 So. 2d at 242. In two decisions handed down in 1990, the Mississippi Supreme Court held that, under MISS. CODE ANN. § 83-17-1 (Supp. 1990), insurance companies are bound by the acts or knowledge of their agents and cannot escape liability based upon a claim that the insurance company had no knowledge of such acts. Further, the insurance company may be held liable for punitive damages for wrongful acts by its agents when the insurance company does not investigate to discover these acts and disclaims liability based on false information furnished by its agents or other wrongful acts of the agents. McCann v. Gulf Nat'l Life Ins. Co., 574 So. 2d 654, 656-57 (Miss. 1990) (1990); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1187 (Miss. 1990).

[148] 574 So. 2d 13 (Miss. 1990).

> It is imperative that some parameters be developed for the guidance of juries and courts fixing the amount of punitive damages. The present undefined and open-ended status breeds disrespect for the law and for the courts and cannot be defended in reasoned debate. Standards need to be developed which will result in reasonable similar consequences, given reasonably similar circumstances. This objective has not been seriously addressed by this Court, and by few in the nation. It is a legitimate judicial undertaking, and should be accomplished by finding a just resolution of the several cases that come before us, one at a time. When enough cases have been decided the rules shall have emerged. We do not write statutes.[152]

He went on to cite a number of statutes enacted by various states which limit or restrict punitive damages recoveries.[153] Whether this opinion indicates that the Mississippi Supreme Court will judicially restrict punitive damage awards remains to be seen. The court's opinion in this case could just as easily be considered a plea to the legislature for statutory limitations on punitive damages.[154]

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[149] *Id.* at 18.

[150] *Id.* at 16-18.

[151] *Id.* Justice Blass joined at least two other outspoken critics of punitive damage awards in Mississippi. *See* Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 86-89 (1988) (O'Connor, J., concurring) (grant of "wholly standardless discretion "to jury to determine severity of punishment "appears inconsistent with due process"); Eichenseer v. Reserve Life Ins. Co., 894 F.2d 1414, 1415-22 (5th Cir. 1990) (Jones, J., dissenting) (lawyers seek punitive damages in cases with little or no merit in hopes of forcing settlement or hitting the jackpot).

[152] *Id.* at 17.

[153] *Id.*

[154] *Id.* In this and one other case the supreme court indicated that a one-year delay in payment without arguable reason is "unreasonable delay". *Harvey Latham*, 574 So. 2d at 15, *Gregory*, No. 07-59256, slip op. at 13-14. *But see* Roberts v. State Farm Mut. Auto. Ins. Co., 567 So. 2d 1193, 1195, 1197 (Miss. 1990) (insurance company tendered payment for medical bills four years after they were submitted by insured, however court deferred to jury's finding that insured not entitled to compensatory or punitive damages). In two cases the Mississippi Supreme Court reiterated its rule that normally the insured must receive a directed verdict on the issue of contract damages before the issue of punitive

III. CONSTITUTIONAL LAW

In 1990, the Mississippi Supreme Court handed down decisions in several cases involving constitutional questions. These cases involved equal protection claims under the fourteenth amendment[155] procedural due process claims under the fourteenth amendment[156] and fifth amendment.[157] In deciding several miscellaneous questions involving both the state and federal constitutions[158] the Mississippi Supreme Court appeared to join the trend by state supreme courts to address civil liberties issues on the basis of state constitutional provisions rather than federal constitutional provisions.[159]

In *Kirksey v. Dye*,[160] Henry J. Kirksey, a state senator and Jessie Pendelton, a private citizen sued Brad Dye, lieutenant governor of the State of Mississippi, and others.[161] Plaintiffs contended that Dye was

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damages may be submitted to the jury, but there are exceptions to this "rule". Simpson v. State Farm Fire & Cas. Co., 564 So. 2d 1374, 1376-80 (Miss. 1990); Andrew Jackson Life Ins. Co. v. Williams, 566 So. 2d 1172, 1184-86 (Miss. 1990).

[155] Terrell v. State, 573 So. 2d 732, 733-74 (Miss. 1990) (state prison inmates are protected by fourteenth amendment from racial discrimination in all areas of prison administration, including job assignments and discipline).

[156] Terrell v. State, 573 So. 2d 730, 731-32 (Miss. 1990) (when state prisoner placed in administrative segregation, prisoner is entitled to minimal due process including informal evidentiary review, notice of charges, and opportunity to be heard).

[157] Moore v. Moore, 558 So. 2d 834, 837-38 (1990) (divorce proceeding to determine compliance with court's order may be quasi-criminal proceeding (combined criminal and civil contempt hearing) and, therefore, defendant is entitled to protection of fifth amendment right against self-incrimination; defendant cannot refuse to take stand but may invoke fifth amendment protection on question-by-question basis; court is not required to inform appellant of his constitutional right against self-incrimination).

[158] Mississippi State Tax Comm'n v. One 1980 Black Mercury Grand Marquis, 568 So. 2d 707, 709-11 (Miss. 1990) (seizure and forfeiture proceedings pursuant to MISS. CODE ANN. § 67-1-17 (1972) against automobile used to transport contraband in violation of criminal statute not violative of prohibition against unreasonable seizure contained in U.S. CONST. amend. IV or equal protection and due process rights guaranteed by U.S. CONST. amend. XIV); Mississippi State Tax Comm'n v. Bates, 567 So. 2d 190, 193-94 (Miss. 1990) (tax assessed on carpet store not "carrying on business within the state" held violative of commerce clause, U.S. CONST. art. 1, § VIII, cl. 3; Wong v. Garden Park Community Hosp., 565 So. 2d 550, 552-54 (Miss. 1989) (MISS. CODE ANN. § 73-25-93(1) (Supp. 1990) legally requires any hospital licensed in state to provide due process protection in personnel matters; procedural due process must be afforded in personnel matters, however, judicial review of due process clause compliance limited to hospital's compliance with its own due process by-law requirements).

[159] *See, e.g.*, Morley, *Pro Se*, STUDENT LAWY., Feb. 1991, at 18 (notes recent trend among some state supreme courts to resolve civil liberties questions by resorting first to state rather than federal constitution).

[160] 564 So. 2d 1333 (Miss. 1990).

[161] *Kirksey*, 564 So. 2d at 1334.

an executive officer of the state government and that his service on a legislative budget committee violated the state constitutional requirements for separation of powers.[162] Relying on previous authority, the court quickly disposed of the claim on its merits.[163] Interestingly, the lower court had granted summary judgment for Dye on the basis that Kirksey and Pendelton lacked standing to bring the suit.[164] The justices in the majority and two dissenting justices,[165] unanimously agreed on the standing issue that Kirksey and Pendelton did in fact have standing to bring the lawsuit.[166] While there was little comment concerning the issue[167] this ruling appears to grant very broad "citizen standing" for suits under the Mississippi Constitution.[168]

In *Mississippi Employment Security Commission v. McGlothin*,[169] the court decided an appeal by McGlothin from the denial of unemployment benefits.[170] McGlothin was employed by the Jackson Municipal Separate School District as a teacher's aide.[171] "As an expression of her religious and cultural heritage, McGlothin would at times wear a head wrap 'especially during times of spiritual growth'."[172] After disobeying orders to discontinue wearing the head wrap, McGlothin was fired by the school district and was denied unemployment benefits on the basis that her firing had been due to "misconduct."[173] There were undisputed findings of fact by the referee during the administrative hearing and appeal that [c]laimant wears berets and head dresses as an expression of her religious and cultural heritage. The custom is not dictated by the Ethiopian Culture, but is claimant's preference in expressing her ancestry."[174] The Mississippi Supreme Court, citing previous federal authority as well as both the United States and Mississippi Constitutions,[175] found that the case turned on "MESC's core finding . . . that McGlothin wore head wraps as a form of both religious and cultural expression."[176] The court held that "McGlothin's conduct was constitutionally protected religious and cultural expression" and affirmed the lower court.[177] The authority and precedent cited by the Mississippi Supreme Court in this case dealt with questions involving freedom of religion and religious expression.[178] The supreme court found state and federal constitutional protection for both religious and "cultural" expression.[179] It remains to be seen how the protection of cultural expression will be developed in later cases reaching the court. Certainly the argument can be made that in our racially and culturally diverse culture, expression of a cultural nature deserves a high degree of constitutional protection, whether from the Mississippi or federal constitution, in order to preserve individual rights.

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[162] *Id.* at 1334-35. Mississippi's constitution provides that the powers of the state government shall be divided into three "distinct departments, and each of them confided to a separate magistracy" with the legislative, judicial and executive branches separated accordingly and further provides that no person "belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments." MISS. CONST. art. 1 §§ 1, 2.

[163] *Kirksey*, 564 So. 2d at 1335-36 (citing Dye v. State *ex rel.* Hale, 507 So. 2d 332, 346-47 (Miss. 1987) (although lieutenant governor is officer of executive branch of state government, he is also member of legislative branch of state government and may constitutionally serve in both branches)).

[164] *Id.* at 1334, 1336-37.

[165] *Id.* at 1337-38. Seven justices participated in the decision while two justices did not. *Id.*

[166] *Id.*

[167] *Id.* at 1336, 1338.

[168] Compare the very narrow standing requirement for suits under the federal constitution in which "injury in fact" is a major element. Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 480-82 (1982).

[169] 556 So. 2d 324 (Miss.), *cert. denied*, 111 S. Ct. 211 (1990).

[170] *McGlothin*, 556 So. 2d at 325.

[171] *Id.*

[172] *Id.*

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[173] *Id.* at 325-27. McGlothin had been denied benefits upon her original application for unemployment benefits and appealed for administrative review. *Id.* at 327. The administrative referee confirmed the denial of benefits. *Id.* McGlothin next appealed to the Mississippi Employment Security Commission board of review which affirmed the referee. *Id.* McGlothin then appealed to the Circuit Court of the First Judicial District of Hinds County, which reversed on grounds that "McGlothin's conduct was protected under the first amendment free exercise clause." *Id.* The Mississippi Employment Security Commission appealed from the circuit court to the Mississippi Supreme Court. *Id.* at 325, 327.

[174] *Id.* at 327.

[175] *Id.* at 329 (citing Frazee v. Illinois Dep't of Empl. Sec., 109 S. Ct. 1514, 1516-18 (1989) (state may not deny unemployment benefits on grounds individual has refused to abandon sincerely held religious beliefs). "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. CONST. amend. I. The court also cited the fourteenth amendment as providing an equal protection basis for its holding. *McGlothin*, 556 So. 2d at 329. Additionally, the court cited MISS. CONST. art. 3, § 13 (1890), which provides "the freedom of speech . . . shall be held sacred . . . ." *McGlothin*, 556 So. 2d at 329.

[176] *McGlothin*, 556 So. 2d at 329.

[177] *Id.* at 331.

[178] *See supra* notes 89-92.

[179] *McGlothin*, 556 So. 2d at 331.

In *Knight v. State*,[180] the Mississippi Supreme Court considered whether the Mississippi constitutional prohibition against lotteries extended to bingo.[181] Following a number of complaints filed by the attorney general's office, the Hinds County Chancery Court enjoined operation of the bingo games.[182] The Mississippi Supreme Court prefaced its analysis of the question presented by stating that "[c]onstitutions must be read objectively — if possible. Thus, this Court asks what the language means, not what the framers intended."[183] The court then stated that the best approach was to simply "look to the popular meaning of 'lottery' and 'bingo' " in order to determine whether bingo was in fact a lottery within the meaning of the constitution.[184] The court refused to accept the definition of lottery relied upon by the chancellor finding that the elements citing were present in all forms of gambling and in some forms of business.[185] The court also refused to accept that the word "lottery" in the constitution amounted to a generic term which encompassed all forms of gambling.[186] Finally the court refused to accept that bingo was a lottery simply because authority in other jurisdictions had so held.[187] The court then zeroed in on a definition of lottery and focused on a prohibition in the constitution against selling tickets for a lottery and stated that "[t]his rather clearly connotes a particular kind of lottery: one with tickets."[188] The court then reasoned that the constitutional prohibition was against lottery games in which tickets were sold and drawings were held, neither of which was present in the game of bingo and held that, therefore, bingo was not a lottery within the prohibition of the Mississippi Constitution.[189]

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[180] 574 So. 2d 662 (Miss. 1990).

[181] *Knight*, 574 So. 2d at 663. The Mississippi Constitution states: "No lottery shall ever be allowed . . . in this state." MISS. CONST. art. 4, § 98.

[182] *Knight*, 574 So. 2d at 663. The chancellor held that bingo was a "lottery and therefore unconstitutional." *Id.* at 664. The chancellor relied upon Naron v. Prestige, 469 So. 2d 83, 86 (Miss. 1985), which cited R.S. Williams Furniture Co. v. McComb Chamber of Commerce, 147 Miss. 649, 657 112 So. 579, 580 (Miss. 1927), which defined "lottery" as "(1) [t]he offering of a prize; (2) the awarding of a prize by chance; (3) the giving of a consideration for the opportunity to win a prize; and all three of these elements must concur in order to constitute a lottery." *Knight*, 574 So. 2d at 664.

[183] *Knight*, 574 So. 2d at 667.

[184] *Id.* at 668.

[185] *Id.* at 668-69.

[186] *Id.* at 669.

[187] *Id.* at 668.

[188] *Id.* at 669.

[189] *Id.*

In *Wilson v. State*,[190] the constitutionality of Mississippi's statutory provision for payment of attorneys appointed to defend indigents was challenged.[191] The statute was attacked on several constitutional grounds.[192] First it was alleged that the statute amounted to an unconstitutional taking of property in violation of section 17 of the Mississippi Constitution; second, it was alleged that the low fee deprived indigent defendants of effective assistance of counsel in violation of section 26 of the Mississippi Constitution; and third, it was alleged that the limitation on fees was a violation of the equal protection clause.[193] The court found the ineffective assistance of counsel argument should be decided on a case-by-case basis and that the equal protection argument was unpersuasive.[194] The court found, however, the taking argument persuasive and construed the statutes "reimbursement" provision as requiring payment of "all actual costs to the lawyer for the purpose of keeping his or her door open to handle [this] case."[195] The court then held that an attorney appointed to handle defense of an indigent in a criminal case was entitled to payment for his services at a rate of $25 per hour.[196] The court stressed that the $25 per hour presumption of actual overhead cost was a rebuttable presumption and that the trial court was bound by this figure "only in the absence of actual proof to the contrary - proof offered by the lawyer that it is more or by the state that it is less."[197] The court then commented that this construction of the statute avoided unconstitutionality on all grounds and would allow an attorney to receive $1,000 in profit per case plus his actual overhead cost, presumed to be $25 per hour.[198] The court expressed hope that this holding would "encourage better participation by members of the Mississippi State Bar in our system of providing attorney representation to indigent defendants."[199]

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[190] 574 So. 2d 1338 (Miss. 1990).

[191] Miss. Code Ann. § 99-15-17 (Supp. 1990) provides as follows: "The compensation for counsel for indigents . . . may not exceed $1,000 . . . . Provided, however, in a capital case two attorneys may be appointed, and the compensation may not exceed $2,000 per case . . . In addition, the judge shall allow reimbursement of actual expenses." The attorneys representing James Wilson, Jr., in a capital murder case had spent totals respectively of 779.2 and 562 hours. *Wilson*, 574 So. 2d at 1339. The lower court had denied their motion for compensation at the rate of $60 per hour because of the statutory limitations. *Id.*

[192] *Wilson*, 574 So. 2d at 1339.

[193] *Id.* at 1340.

[194] *Id.* at 1341.

[195] *Id.* at 1340.

[196] *Id.*

[197] *Id.* at 1340-41.

[198] *Id.* at 1341.

In *Gannett River States Publishing Co. v. Hand*,[200] a case involving conflict between the constitutional rights to a fair trial and to a free press,[201] the court forged a procedural mechanism for determining when pre-trial proceedings may be closed to the press.[202] The controversy in this case arose when Hand, through one of his attorneys, contacted the trial judge and asked that certain discovery, pleadings and motions be placed in a file closed to the public pending a hearing on closure.[203] A reporter for the Jackson, Mississippi, *Clarion Ledger*, who was doing a story on the trial was allowed, through a mistake on the deputy clerk's part, to look at one of these closed files.[204] She wrote a story in the *Clarion Ledger* concerning the information found in the closed files.[205] Thereafter, the reporter and the attorney for Gannett, the publisher of the *Clarion Ledger*, were summoned to appear in Tallahatchie County Circuit Court as witnesses so that the court could determine how the information was obtained.[206] As Gannet's attorney walked into the courtroom, he heard a closure order issued from the bench and sought to intervene.[207] The court had entered the order of closure on its own motion and refused to allow a hearing.[208] The closure order was appealed to the Mississippi Supreme Court.[209] The court noted that while it was natural and "praiseworthy" for the press to desire to publicize criminal proceedings, on occasions such publicity could prejudice the defendant's right to a fair trial.[210] The court noted that it had held that where a defendant could persuade a trial court to make an on-the-record determination that there was a substantial probability that his right to a fair trial would be prejudiced by pre-trial publicity and where there were no less restrictive alternatives, then a court could order that press access to pre-trial proceedings and the trial itself be restricted.[211] The court then found that even though a criminal defendant might have an overriding interest in a right to a fair trial, the first amendment rights of the press and the public required notice and a hearing before a closure order could be entered.[212] The court then set forth the following procedure:

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[199] *Id. See* ABA J., Feb. 1991, at 14 ("[M]any southern states . . . have limited [public] defender programs such as those in . . . Mississippi").

[200] 571 So. 2d 941 (Miss. 1990).

[201] *Hand*, 571 So. 2d at 942.

[202] *Id.* at 945.

[203] *Id.* at 942-43.

[204] *Id.* at 943.

[205] *Id.*

[206] *Id.* at 942-43.

[207] *Id.* at 943.

[208] *Id.*

[209] *Id.* The court refused Gannett's motion to reconsider closure but stated that Gannett would be allowed to file a motion to vacate the closure order and a hearing would be scheduled "as soon as possible, probably . . . a week before trial." *Id.* Gannett filed an emergency motion with the Mississippi Supreme Court to stay any further proceedings, but this was refused. *Id.* Gannett proceeded to the Supreme Court with a petition for writ of mandamus. *Id.*

[210] *Id.* at 942.

> We hold that any submission in a trial court for closure, either by a party or on the court's own motion, and be it a letter, written motion or oral motion either in chambers or open court must be docketed, as notice to the press and public, in the court clerk's office for at least 24 hours before any hearing on such submission, with the usual notice to all parties. This requirement should not be taken to mean that a greater notice may not be afforded where feasible. Preferably the submission should be a written notice if time and circumstances allow.
>
> A hearing must be had in which the press is allowed to intervene on behalf of the public and present argument, if any, against closure. The movant must be required to "advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceedings, and it must make findings adequate to support the closure." Waller v. Georgia, 467 U.S. 39, 48 (1984) . . . . In considering the less restrictive alternatives to closure, the court must articulate the alternatives considered and why they were rejected. Then the court must make written findings of fact and conclusions of law "specific enough that a reviewing court can determine whether the closure order was properly entered." Press-Enterprise I, 464 U.S. 501, 510 (1984) . . . . A transcript of the closure hearing should be made public and if a petition for extraordinary relief concerning a closure order is filed in this court, it should be accompanied by the transcript, the court's findings of fact and conclusions of law, and the evidence adduced at the hearing upon which the judge bases the findings and conclusions. These requirements cannot be avoided by an agreement between the defendant and state that proceedings and files should be closed."[213]

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[211] *Id.* at 942.

[212] *Id.* at 944.

[213] *Id.* at 945.

The procedure set out appears to be fairly stringent, and, based upon the Mississippi Supreme Court's holdings in enforcement of Mississippi's "Sunshine" Act are likely to be strongly enforced.[214]

Finally, in *Tucker v. Hinds County*,[215] the Mississippi Supreme Court held that "continuance of electrical power is a property interest worthy of protection under the due process clause of the fourteenth amendment."[216] Hinds County had directed that Tucker's electrical service be cut off after it was unable to resolve a zoning dispute with him.[217] The effect of the court's ruling is that a consumer has a right to notice and a hearing prior to the time that a local government, through exercise of its zoning power or otherwise, may order existing electrical service discontinued.[218] The court reversed dismissal as to Hinds County in the court below on summary judgment and remanded for further hearing.[219] Mississippi Power and Light, also a defendant had discontinued electrical service on the basis of unsafe conditions on the premises which violated of Mississippi Public Service Commission regulations.[220] The court held that Mississippi Power and Light had not only the right, but probably the duty, to discontinue electrical service under such circumstances.[221] The court affirmed dismissal as to Mississippi Power and Light.[222]

IV. Wills and Estates

In 1990, the Mississippi Supreme Court rendered decisions in the areas of law relating to judicial conduct,[223] school law,[224] trusts,[225] wills and estates,[226] and evidence.[227] Outlined in the footnotes are the decisions the court issued that are not notably distant from existing law. Three cases will be textually discussed in the area of wills and estates and, additionally, two cases and a proposed court order will be addressed in the area of evidence.

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[214] *See* Van Slyke & Rushing, *Sunshine in Mississippi: The Open Meetings Act*, 60 Miss. L.J. 283, 297-308 (1990) (reviews Mississippi case law concerning litigation under the Mississippi Open Meetings Act).

[215] 558 So. 2d 869 (Miss. 1990).

[216] *Tucker*, 658 So. 2d at 873.

[217] *Id.* at 870-71.

[218] *Id.* at 873.

[219] *Id.* at 874.

[220] *Id.* at 875.

[221] *Id.* at 876.

[222] *Id.* at 874-76.

[223] *In re* Moffett, 556 So. 2d 723, 725-26 (Miss. 1990) (Judge should recuse himself where reasonable person, with knowledge of all circumstances, would doubt judge's impartiality); Nichols v. Munn, 565 So. 2d 1132, 1137 (Miss. 1990) (where judge makes comment displaying "incredulity" before jury, plain error occurred requiring reversal).

[224] Citizens Involved Voluntarily in Consolidation v. Wayne County Bd. of Educ., 574 So. 2d 619 (Miss. 1990) (public referendum election required by Miss. Code Ann. § 37-7-105 (1972) applies only to reorganization of territorial school district boundaries, not to school consolidations within district boundaries); Greenville Pub. School Dist. v.

In *Marsalis v. Lehman*,[228] the Mississippi Supreme Court made clear which test should be used for rebutting the presumption of undue influence, when a confidential relationship exists between the proponent of the will and the testatrix.[229] In *Marsalis*, Mrs. Tamma M. Lehmann executed her last will and testament, leaving the bulk of her estate to her daughter, Lois Marsalis, who was also named as

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Western Line Consol. School Dist., No. 07-59534, slip op. at 19 (Miss. Dec. 12, 1990) (territory annexed into one school district does not automatically become part of that district if it was currently in another district at time of annexation).

[225] Stubbs v. Wood, 578 So. 2d 734, 735 (Miss. 1990) (several documents even unrecorded ones, may be incorporated into creation of trust).

[226] Graham v. Bank of Leakesville, 556 So. 2d 1079, 1080 (Miss. 1990) (where joint savings account is established and statutory presumption that all deposits are made for joint ownership is not overcome, bank has right to set-off against surviving depositor's individual debt to bank). Dees v. Estate of Moore, 562 So. 2d 109, 112 (Miss. 1990) (party may combine suit to determine heirship with suit to contest will); Tinnin v. First United Bank of Mississippi, 570 So. 2d 1193, 1195 (Miss. 1990) (where trust has discriminatory language which makes it illegal, it may survive without prejudicial language if primary purpose is not discriminatory); Fields v. Harris, 570 So. 2d 1202, 1203 (Miss. 1990) (two-year statutory time limit for contesting will or probating new will begins when will is probated, which refers to act of clerk accepting will for probate); Gallaspy v. Gallaspy, 562 So. 2d 74, 77-78 (Miss. 1990) (where fiduciary relationship exists between testatrix and executrix, presumption of undue influence may be overcome by clear and convincing evidence).

[227] Enroth v. Memorial Hosp. at Gulfport, 556 So. 2d 202, 204-05 (Miss. 1990) (court may judicially notice legal status of hospital, as political subdivision of state, and may rely on any source deemed helpful in making determination); Chisolm v. Eakes, 573 So. 2d 764 (Miss. 1990) (paternity blood tests, while showing high probability of alleged father's paternity, are not conclusive evidence of paternity); Jethrow v. Jethrow, 571 So. 2d 270, 272-73 (Miss. 1990) (child may testify in divorce proceedings between his parents); Harris v. Shields, 568 So. 2d 269, 273 (Miss. 1990) (in medical malpractice case, adequate proof of proximate cause requires that plaintiff supply evidence that proper treatment of victim would have provided victim with greater than 50% percent chance of substantially better result than that which was obtained); Ball v. Sloan, 569 So. 2d 1177, 1179 (Miss. 1990) (extrinsic evidence may not be used to prove specific instances of witness' conduct, other than proving conviction of crime).

[228] 566 So. 2d 217 (Miss. 1990).

[229] *Marsalis*, 556 So. 2d at 219-20. In Mississippi, it seems to be well established that a presumption of undue influence arises when the legatee has a fiduciary or confidential relationship with the testatrix, and this presumption must be overcome by clear and convincing evidence. *Id.* at 219.

executrix.[230] The will was executed the presence of Lois, Lois' husband and two attesting witnesses.[231] Approximately six months later Mrs. Lehmann died and the appellants' contested the will on the ground of undue influence.[232] The chancery court granted summary judgment in favor of the appellants, holding that a confidential relationship did exist between Lois and the testatrix and, therefore, a presumption of undue influence arose.[233] The court found that the presumption was not overcome because Lois did not show the elements set forth in *Lee v. Estate of Polk*, 497 So. 2d 815, 817-18 (1986), primarily that the grantor had "[a]dvice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest."[234] The Mississippi Supreme Court reversed and remanded holding that the test for rebutting a presumption of undue influence was controlled by *Mullins v. Ratcliff*, 515 So. 2d 1183 (Miss. 1987).[235] The court pointed out that the independent advice of a competent person was no longer required, but instead, a showing of the grantor's "independent consent and action was the test."[236] The court concluded that there was a genuine issue of material fact, and that the lower court committed reversible error in not allowing Lois to proceed with a full trial and present evidence in rebuttal of the undue influence claim.[237]

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[230] *Id.* at 218. Mrs. Lehmann executed her last will and testament on February 14, 1984. *Id.* Proponents of the will and named beneficiaries were the appellants, Lois Marsalis and Judge Marsalis Clark. Albert Lehmann, Amy Lehmann Garraway, Louis Lehmann, Jr., Geoffrey Lehmann, and Lucy Lehmann were contestants of the will. *Id.* Mr. Lehmann died on August 21, 1984 in Vicksburg, Mississippi. *Id.*

[231] *Id.* Mrs. Lehmann told Lois to ask Mr. Drake, her attorney, to draw up a new will for her. *Id.* at 218-19. Lois conveyed the information and Mr. Drake sent a new will to Mrs. Lehmann. *Id.* at 219. She executed the will in front of Lois and her husband, and Katherine and Dwayne Stagg, the two attesting witnesses. *Id.*

[232] *Id.* at 218. The appellees asserted undue influence based on the close relationship Lois had with her mother. *Id.* at 219.

[233] *Id.* The judgment set aside the will, revoked Letters Testamentary to Lois, and ordered a distribution of the estate according to the Mississippi laws of descent and distribution. *Id.*

[234] *Id.* The court relied on the test utilized in Lee v. Estate of Polk, 479 So. 2d 815, 817-18 (Miss. 1986), which set forth the test to rebut the presumption of undue influence requiring good faith on the past of the grantee/beneficiary; grantor's full knowledge and deliberations of her actions and their consequences; and the advice of a competent person disconnected from the grantee and devoted wholly to the grantor/testator's interest.

[235] *Marsalis*, 556 So. 2d at 219-20.

[236] *Id.* The court used the test set forth in *Mullins*, which declared: the legatee must show "(1) his good faith; (2) the testatrix' full knowledge and deliberation of her actions and their consequences; and (3) the testatrix' independent consent and action." *Id.* at 220 (quoting *Mullins*, 515 So. 2d at 1193).

[237] *Id.* at 220.

In *Estate of Gardner v. McIntosh*,[238] the Mississippi Supreme Court broadened the statute concerning illegitimate and intestate succession. The court determined that when an illegitimate child filed a timely petition for Letters of Administration allegiant a child relationship with the intestate decedent, that substantial compliance with section 91-1-5(3)(c) of the Mississippi Code, occurred, and therefore, the child would not be barred from having a claim against the decedent's estate.[239] In *Gardner*, soon after the decedent, Prentiss Gardner, died, his alleged illegitimate son, Algia Lee Wash, filed a Petition for Letters of Administration and was appointed administrator.[240] Rebecca McIntosh, decedent's sister-in-law, then sought a protective order seeking to remove Wash as administrator.[241] The chancellor ruled that Wash failed to file a claim within 90 days of publication of notice to creditors, as required by statute.[242] The Mississippi Supreme Court reversed and remanded.[243] Citing *Perkins v. Thompson*, 551 So. 2d 204 (Miss. 1989), the court held that by filing the Petition for Letters of Administration in which Wash alleged he was Gardner's son and sole surviving heir-at-law, Wash substantially complied with the statutory requirements.[244]

In *Beauchamp v. Beauchamp*,[245] the Mississippi Supreme Court made evident that the law of the person's domicile is to be used when construing the provisions of a testator's will unless the instrument clearly indicates that the laws of another jurisdiction should control.[246] In *Beauchamp*, George Beauchamp died testate while being domiciled in Milwaukee, Wisconsin.[247] Mr. Beauchamp owned one hundred and twenty (120) acres of farmland in Hinds County, Mississippi, which he devised to his children.[248] The plaintiff filed suit alleging that the restraint upon the alienation of property contained in the will should be removed because the law of the decedent's domicile should be applied to construe the will.[249] The lower court held that the restraint violated Mississippi law; but used the doctrine of equitable approximation and gave the will effect accordingly.[250] The Mississippi Supreme Court reversed and remanded, holding that the lower court was in error when it failed to apply the law of decedent's domicile.[251] The court noted that while the will must be probated in Mississippi, that does not preclude Mississippi courts from applying the law of the testate's domicile.[252]

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[238] 566 So. 2d 1208 (Miss. 1990).

[239] *Gardner*, 566 So. 2d at 1211-12. MISS. CODE ANN. § 91-1-15(3)(c) (Supp. 1988) requires that " 'an action seeking adjudication of paternity is filed' within . . . ninety (90) days after the first publication of notice to creditors."

[240] *Gardner*, 566 So. 2d at 1209. Wash contended he was an illegitimate son, yet in his petition he represented himself as Mr. Gardner's son, never disclosing that he was illegitimate. *Id.* at 1209.

[241] *Id.* at 1210. Rebecca McIntosh and Charles E. Hopkins, Gardner's step-son, were both appellees in the case. *Id.* at 1209. While Gardner was still alive the two had filed a petition for appointment of conservator because of gardner's advanced age. *Id.* Wash filed an answer to petition for appointment of conservator denying that Ms. McIntosh should be appointed conservator. *Id.* However, before any hearing on the matter, Mr. Gardner died. *Id.*

[242] *Id.* at 1209. In Newton County Chancery Court dismissed the claim of heirship by Wash as being time barred by the statute of limitations of MISS. CODE ANN. § 91-1-15(3)(c)(Supp. 1988). *Gardner*, 566 So. 2d at 1209.

[243] *Gardner*, 566 So. 2d at 1213.

[244] *Id.* at 1212-13. The Court found that the instant case had very similar facts to the case of *Perkins v. Thompson*, 551 So. 2d 204 (Miss. 1984) and applied the rule set forth in *Perkins* that the appellant did substantially comply with the statute so his claim should not be barred on procedural grounds. *Gardner*, 566 So. 2d at 1212.

[245] 574 So. 2d 18 (Miss. 1990).

V. EVIDENCE

In *Cooper v. State Farm Fire & Casualty Co.*,[253] the Mississippi Supreme Court explicitly declared that hearsay evidence may not be offered as impeachment evidence if the primary purpose is to place substantive evidence before the jury.[254] The appellants, Jackie and Faye Cooper, sued State Farm for denial of a claim for insurance after their home was destroyed by fire.[255] State Farm claimed the fire was the result of arson committed by the appellants.[256] At trial, State Farm employees testified regarding telephone conversations with Faye Cooper's sister, Susie Arnett, in which Arnett allegedly informed State Farm that the Coopers committed the arson.[257] State Farm offered the testimony after Arnett denied the phone conversation, purporting that the testimony was offered to impeach Arnett.[258] The circuit court allowed the testimony and entered a jury verdict for State Farm.[259] The Mississippi Supreme Court reversed and remanded, concluding that the testimony had been offered "under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible . . . as a device to avoid the hearsay rule."[260]

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[246] *Beauchamp*, 574 So. 2d at 23.

[247] *Id.* at 18.

[248] *Id.* Mr. Beauchamp was survived by ten (10) children and the descendants of two (2) children who predeceased him. *Id.* According to Louis Beauchamp testate's son, his father had expressed a desire to keep the Hinds County property in the family. *Id.* Mr. Beauchamp left all of his property equally to his children, and the children of any predeceased child to take his parent's share. *Id.* The will contained a provision that the Hinds County land should not be sold during the lifetime of any child or grandchild or thirty years thereafter. *Id.*

[249] *Id.* at 19. Iona Beauchamp, Mr. Beauchamp's granddaughter, filed suit against Albert and Velma Beauchamp, *et al.*, for removal of the will's restraints and for a public sale of the Hinds County property. *Id.*

[250] *Id.* The chancellor held that the Hinds County realty could not be sold or transferred during the life of any of decedent's children or any of the children of the deceased children who predeceased the testator. *Id.*

[251] *Id.* at 23.

[252] *Id.* at 21.

[253] 568 So. 2d 687 (Miss. 1990).

[254] *Cooper*, 568 So. 2d at 690-91. The court held that the admission of impeachment evidence would violate Rules 607 and 801 Miss. R. Evid. if its primary purpose was to put substantive evidence before the jury. *Id.* at 696.

[255] *Id.* at 688-89. Jackie and Faye owned a home in Tuka and had approximately

In *Bailey v. Woodcock*,[261] the Mississippi Supreme Court held that statements of a child cannot be used as evidence of sexual abuse unless the testimony falls within a hearsay exception under Miss. R. Evid. 803.[262] During a trial concerning a father's visitation rights because of alleged sexual abuse, statements of the child made to the mother, two social workers, and the grandparents were admitted as evidence.[263] Subsequently, the trial court terminated the father's visitation rights.[264] These statements constituted all the evidence of abuse against the father.[265] The father appealed on the basis that there was

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$44,400.00 fire insurance coverage on it through a State Farm policy. *Id.* at 689.

[256] *Id.* at 689. State Farm denied the Cooper's claim because "the fire resulted from acts chargeable to the named insureds in the policy" along with several other stated reasons. *Id.*

[257] *Id.* at 690. A State Farm investigator and two agents testified, over objection, that they talked to a woman who identified herself on the phone as Arnett, and claimed the Coopers burned their house down. *Id.*

[258] *Id.* at 691.

[259] *Id.* at 690.

[260] *Id.* at 691-92. The court looked at the purpose of the testimony, noting that Miss. R. Evid. 801 allows prior inconsistent statements for impeachment purposes, but not as substantive evidence. *Id.* at 691.

[261] 574 So. 2d 1369 (Miss. 1990).

[262] *Bailey*, 574 So. 2d at 1374.

[263] *Id.* at 1372. In 1985, Steve Bailey and Donna Woodcock were granted a divorce. *Id.* at 1370. Donna was awarded custody of their one year old daughter and Steve was granted visitation rights. *Id.* When the child was three years old, Donna noticed her vaginal area was red and irritated after returning from a trip to her father's house. *Id.* The daughter said her father stuck his finger in her, after which Donna reported the conduct to the Hinds County Welfare Department. *Id.*

[264] *Id.* at 1371.

[265] *Id.*

insufficient evidence of sexual abuse.[266] The Mississippi Supreme Court reversed and remanded.[267] The court found that there was no finding that the statements qualified under the Miss. R. Evid. 803.[268] The court declared that since there was currently no Mississippi Rule of Evidence directed solely at testimony involving child abuse, then the traditional rules of evidence must be applied.[269]

Perhaps in response to *Bailey v. Woodcock*,[270] the Mississippi Supreme Court submitted proposed amendments to the Mississippi Rules of Evidence to the bench, the bar, and the public for review; the comment period to run until February 1, 1991.[271] The proposed changes concern a new rule, Rule 617, which would allow the use of close-circuit television to show a child's testimony in sexual abuse cases.[272] An amendment to rule 803(4) was proposed concerning the hearsay exception for statements made for the purpose of medical diagnosis or treatment.[273] The amendment to rule 803(25) concerns the tender years exception for a statement made by a child of tender years describing any act of sexual contact.[274] Finally, the Court submitted the proposed amendment, Rule 804(a)(6) concerning when a child may be considered as unavailable.[275]

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[266] *Id.* Steve alleged the lower court's decision was against the overwhelming weight of credible evidence. *Id.*

[267] *Id.* at 1373-74.

[268] *Id.* at 1372. The court went through the hearsay exceptions that could possibly be applicable, Miss. R. Evid. 803(1), (2), (3), (4) and (24) and found that the lower court failed to make any determination which were being used. *Id.* at 1372-73.

[269] *Id.* at 1373. The court noted that the legislative act that would have governed this type case was struck down because the it is within the power of the court to decide rules of evidence. *Id.*

[270] *See supra* notes 261-269 and accompanying text.

[271] *In re* Adoption of the Mississippi Rules of Evidence, No. 89-99002 (Miss. Dec. 27, 1990).

[272] *Id.* at 3. This new amendment would allow a child under the age of sixteen (16) to testify outside of the courtroom upon a finding that there is substantial likelihood that the child would suffer a traumatic emotional distress. *Id.*

[273] *Id.* at 4. The amendment to 803(4) would recognize statements made during medical diagnosis that may encompass mental and emotional conditions as well as physical conditions. *Id.*

[274] *Id.* at 5. This would be a new hearsay exception and would allow statements made by a child of tender years if the court determines that the statement provides substantial indicia of reliability, and the child either (1) testifies at the proceedings or (2) is unavailable, provided there is corroborative evidence of the act. *Id.*

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Scott F. Leary
Benjamin H. Sanders

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[275] *Id.* at 6. Rule 804(a)(6) would provide that a child may be unavailable if it is shown that there is a substantial chance the emotional health of the child would be impaired if she had to testify. *Id.*

PROPERTY

In 1990 the Mississippi Supreme Court rendered numerous decisions involving the law of real property. These decisions involved such specific topics as eminent domain,[1] public lands and waterways,[2] leasehold interests,[3] adverse possession,[4] easements,[5] power of sale foreclosure,[6] deed construction,[7] abandoned property,[8] sixteen section land,[9] boundary agreements,[10] mental capacity necessary to convey,[11] fraudulent conveyance,[12] annexation,[13] partition,[14] and insurance as between co-tenants.[15] Several of these decisions provided developments in or

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[1] City of Clarksdale v. Mississippi Power & Light, 556 So. 2d 1056, 1057 (Miss. 1990) (where city's right of eminent domain is creation of statute, any amendment to that statute is treated as though it had been part of original statute); Mississippi State Highway Comm'n v. Charmar, Inc., 569 So. 2d 1132, 1138 (Miss. 1990) (law and equity will not permit persons to assert a position contrary to one taken in prior litigation); American Tel. & Tel. v. Purcell Co., No. 07-59153, slip op. at 11 (Miss. Dec. 19, 1990) (utility conducting interstate commerce and having certificate of public convenience and necessity from federal regulatory authorities for construction of new facilities must still submit to jurisdiction of Mississippi Public Service Commission and obtain state certificate of public convenience and necessity in order to utilize state eminent domain proceedings); Gilich v. Mississippi State Highway Comm'n, 574 So. 2d 8, 12 (Miss. 1990) (damage to adjacent private property caused by public use is compensable and property is damaged when made less valuable); Howell v. Mississippi State Highway Comm'n, 573 So. 2d 754, 758 (Miss. 1990) (where taking undeniably affects value of remaining property not condemned, State should not be allowed to have its witness base an appraisal of fair market value on value of noncomparable empty lots); Governor's Office of Gen. Servs. v. Carter, 573 So. 2d 736, 738 (Miss. 1990) (whether State needs all property it is attempting to condemn is not for any court to decide, but is instead legislative question for condemning authority; only where fraud or clear abuse of discretion is proven by landowner should courts step in).

[2] Dycus v. Sillers, 557 So. 2d 486, 502 (Miss. 1990) (naturally created ponded bodies of water upon lands theretofore private remain private if they are made accessible from public waters by human as opposed to natural means); Ryals v. Pigott, No. 07-59531, slip op. at 16-19 (Miss. Nov. 28, 1990) (navigability in fact test for public waters is not limited to use by large commercial vessels, but includes use by commercial fisherman, floatation of logs, and use by pleasure boaters in commercially rented crafts).

[3] Planters Bank & Trust v. Sklar, 555 So. 2d 1024, 1027-28 (Miss. 1990) (landlord's statutory lien is superior to all other claims and vest as matter of law without specific mention in lease agreement and may apply to proceeds of crop sales); Meyn v. City of Gulfport, 570 So. 2d 1198, 1201 (Miss. 1990) (where interference is not caused by lessor but is instead caused by stranger or by one not having paramount right to leased property, lessor is not in breach of implied covenant of quiet enjoyment with lessee); Ewing v. Adams, 573 So. 2d 1364, 1365 (Miss. 1990) (words "to be used for a drive-in movie theater" did not restrict lessees' use of property to that specific purpose).

[4] Jordan v. Goodson, 558 So. 2d 848, 851 (Miss. 1990) (individual may not claim right of adverse possession during period when servient property is leased to adverse possessor's father); Stallings v. Bailey, 558 So. 2d 858, 860-61 (Miss. 1990) (where fence enclosed property for period of at least ten years, under claim of adverse possession title vests in possessor, notwithstanding fence was subsequently removed or fell into

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disrepair).

[5] Miller v. Culpepper, 556 So. 2d 1074, 1077-78 (Miss. 1990) (where call in prior deeds is abuttal to public road or to easement for road there is implied grant of easement in right of way).

[6] Merritt v. Magnolia Fed. Bank for Sav., 573 So. 2d 746, 749 (Miss. 1990) (when landowner appears in clerk's office ready, able, and willing to pay money required to redeem his property and clerk either arbitrarily or unintentionally refuses offer, clerk loses his lawful authority to execute tax deed on property); Bowser v. Tootle, 556 So.2d 1373, 1375 (Miss. 1990) (where MISS. CODE ANN. § 15-1-15 (1972) affords three year limitation for adverse possession after two year redemption period following tax sale, it can not lend validity to tax sale which is void for want of adequate description of property); Wansley v. First Nat'l Bank of Vicksburg, 566 So. 2d 1218, 1221 (Miss. 1990) (where foreclosure sale is conducted in commercially reasonably manner, debtor has no legitimate interest served by insisting that trustee have no prior connection with secured creditor).

[7] Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 352-53 (Miss. 1990) (court will effect construction of deed that best comports with parties intent utilizing three tier process).

[8] Raines v. Spruill, 569 So. 2d 1128, 1131 (Miss. 1990) (landowner who abuts abandoned property procures title to it and where landowner can show there is no material issue of fact as to whether abandoned property abuts his land, landowner is entitled to summary judgment).

[9] Chevron U.S.A., Inc. v. State, No. 07-58036, slip op. at 18 (Miss. Apr. 4, 1990) (where State has leased sixteenth section land under oil and gas lease, lessee may continue to work producing field beyond twenty five year lease limit in MISS. CONST. art VIII, § 211 (1890), but may not explore other nonproducing areas).

[10] Goff v. Lever, 566 So. 2d 1274, 1275 (Miss. 1990) (boundary line agreement between grantor and adjacent landowner binds any subsequent grantee in same manner that it would bind grantor).

[11] Smith v. Smith, 574 So. 2d 664, 653 (Miss. 1990) (where party challenging execution of deed shows by clear and convincing evidence that grantor suffered from "weakness of intellect" coupled with inadequate or lack of consideration, such showing may warrant equitable relief).

[12] Sullivan v. Heal, 571 So. 2d 278, 280 (Miss. 1990) (fraud must be established by clear and convincing evidence).

[13] Magnolia Marine Transp. Co. v. City of Vicksburg, 560 So. 2d 713, 714 (Miss. 1990) (chancery court sitting in annexation confirmation proceeding has power to confirm annexation of less than entire area municipality seeks to annex).

[14] Pernell v. Mathews, 562 So. 2d 1263, 1265 (Miss. 1990) (in suit for partition of land where one defendant does not assert side issue or claim against another co-defendant regarding land in question, then first defendant is not required to cross-claim).

[15] Sullivan v. Eason, 558 So. 2d 830, 832, 34 (Miss. 1990) (where co-tenant insurers jointly owned realty with jointly owned funds and does so for benefit of all co-tenants, insurance proceeds are for benefit of all co-tenants).

modifications to Mississippi property law and will therefore be discussed in detail.

I. Eminent Domain

In *Mississippi State Highway Commission v. Charmar, Inc.*,[16] the Mississippi Supreme Court held that law and equity would not permit litigants to assert a position on appeal contrary to one taken in the special court of eminent domain below.[17]

In October of 1984, the Mississippi State Highway Commission sought to widen a portion of Highway 49 East located in Yazoo County.[18] The new right of way would take a portion of real property (2400 square feet) owned by J. H. and Gladys Pennington and leased by Kenneth Helton, Charlotte Helton and James Myers.[19] The Heltons and Myers owned and operated a Dairy Queen fast food restaurant under the business name of Charmar, Inc., on the property in question.[20] The right of way would take approximately the front nine feet of the Dairy Queen building.[21] The Commission could not agree with Charmar and the Penningtons on compensation for the property; thus, the Commission filed suit in the Special Court of Eminent Domain in Yazoo County to condemn the property.[22] The eminent domain case was tried on the theory of compensation for the entire building and the jury returned a verdict of $197,715.[23] Charmar then immediately tore down the portion of the restaurant on the right of way, used part of the materials to patch up the building and continued to operate the business.[24] When the Commission attempted to remove the building,

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[16] 569 So. 2d 1132 (Miss. 1990).

[17] *Charmar*, 569 So. 2d at 1138. The court concluded from the record that it was obvious that the eminent domain case was tried by all the parties on the theory that the Commission was acquiring a small strip of land *and the Dairy Queen building. Id.* at 1136 (emphasis added).

[18] *Id.* at 1133.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* The Commission, as was its custom when part of a building was to be taken, took into account the purchase of the entire Dairy Queen restaurant. *Id.* Counsel for Charmar and the Penningtons argued to the jury during the eminent domain proceedings that the entire building was to be destroyed and that they should award damages on this basis. *Id.*

[23] *Id.* at 1133-34. The jury verdict was corrected by the parties and the attorneys to $198,715 in order that the sum of the compensation and damages found would be mathematically correct. *Id.* at 1134 n.1.

[24] *Id.* at 1134.

Charmar refused to leave.[25] The Commission filed suit in chancery court seeking a declaration that the Commission owned the building and requesting that the court enter an injunction to prevent Charmar from interfering with the removal of the building.[26] The chancellor held that the Commission had an adequate remedy at law; therefore, the chancery court was without jurisdiction.[27] The case was transferred to Yazoo County Circuit Court where Charmar and the Penningtons filed motions for summary judgment.[28] The circuit court granted the Commission's motion for summary judgment in part but denied injunctive relief.[29] The circuit court held that the Commission had acquired title to the entire building, but that the Commission's remedy was an action for damages against Charmar for the conversion of the salvage value of the entire building.[30] The net fair market salvage value of the building was stipulated at $4,250.00.[31] The Commission asserted on appeal, *inter alia*, that the lower court erred in refusing to grant the Commission an injunction enjoining Charmar from interfering with the Commission and its contractors in removing the building.[32]

The Mississippi Supreme Court affirmed in part and reversed and remanded in part.[33] The court affirmed the lower court's adjudication that the Commission was vested with title to the Diary Queen building, but reversed and remanded as to the injunction, granting the Commission the right to enter the property and remove the Dairy Queen building.[34] The court concluded that law and equity would not permit litigants to assert a position contrary to one taken in prior litigation, and that Charmar was judicially and equitably estopped from taking the position entirely opposite to their position in the eminent domain proceedings.[35] The court found it obvious from the record that the eminent domain case was tried by all parties on the theory that the Commission was acquiring a small strip of land and the Dairy Queen.[36] The court further noted that this case involved property rights between citizens and the State, and that no court could adjudicate those rights better and more expeditiously than a court of equity.[37] The court noted the chancery court should have retained jurisdiction and disposed of the matter.[38]

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[25] *Id.*

[26] *Id.*

[27] *Id.* The chancellor reasoned that the Commission would not suffer any substantial or irreparable injury if it were not allowed to tear down the building; thus, the elements necessary to obtain an injunction were not present. *Id.* The chancellor noted the Commission could sue for the value of materials converted by the defendants from the portion of the building situated on the right of way and the portion situated on the defendant's land. *Id.*

[28] *Id.*

[29] *Id.* at 1134-35.

[30] *Id.* at 1135. The case went forward on the sole issue of "the damages to which the Commission was entitled." *Id.*

[31] *Id.* at 1136. Prior to the stipulation, the circuit court had granted Charmar's motion in limine which precluded any method of valuation except the fair market salvage value of the building. *Id.*

[32] *Id.* The Mississippi Supreme Court concluded the Commission's first assignment of error was dispositive of the appeal and found it unnecessary to address other assigned errors. *Id.*

[33] *Id.* at 1139.

[34] *Id.*

II. Public Lands and Waterways

In *Dycus v. Sillers*,[39] the Mississippi Supreme Court held that naturally created ponded bodies of water upon land theretofore private remain private if they are made accessible from public waters by human, as opposed to, natural means.[40]

Plaintiffs held record title to the bed of a ninety-two acre body of water in western Bolivar County known as Beulah Crevasse, created when the Mississippi River flooded in 1912.[41] Defendants, Walter Ford, Jimmy Dycus, Roger Dycus and Charley Allen are fisherman.[42] Plaintiffs brought an action in the Chancery Court of the First Judicial District of Bolivar County to quiet and confirm the title they claim in Beulah Crevasse, and by injunction to exclude all others from the waters of the Crevasse.[43] Defendants counterclaimed and sought to enjoin plaintiffs from interfering with their right of ingress and egress to Beulah Crevasse from either Lake Beulah, an oxbow lake six to seven miles long located to the north of Beulah Crevasse, or from the Mississippi River.[44] The chancery court entered final judgment in favor of the plaintiffs and denied defendant's counterclaim.[45]

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[35] *Id.* at 1138

[36] *Id.* at 1136.

[37] *Id.* at 1138-39.

[38] *Id.* at 1139. Justice Dan Lee joined by Justices Hawkins and Anderson, in a dissenting opinion on the denied petition for rehearing, expressed the view that the majority was incorrect for two reasons. (Dan Lee, P.J., dissenting). Justice Dan Lee concluded first that the court did not have the authority to grant summary judgment where it had not been requested. *Id.* Second, the decision reached in the eminent domain court, based on the theory that the building would be totally destroyed, was never appealed. *Id.*

[39] 557 So. 2d 486 (Miss. 1990).

[40] *Dycus*, 557 So. 2d at 502.

[41] *Id.* at 497. Named Plaintiffs in this case included the heirs of Walter Sillers, specifically his widow, Lena R. Sillers, who died in 1983 after suit was filed, Mary S. Skinner, Evelyn S. Pearson, Lilian S. Holleman, John L. Pearson, Evelyn P. Weems, Vernon W. Holleman, Sr., and Florence H. Schoenfeld. *Id.* at 493. Alice K. Jones, the widow of Roy Jones, is a named Plaintiff, as is the Marigold Hunting Club, Inc., a Mississippi corporation. *Id.*

[42] *Id.* at 493.

[43] *Id.* at 497. No one denied that the plaintiffs owned record title to the lands cov-

The Mississippi Supreme Court affirmed, holding, naturally created ponded bodies of water upon lands theretofore private remain private if they are made accessible from public waters by human as opposed to natural means.[46] The court regarded the state of the watercourse connecting the Crevasse and Lake Beulah immediately prior to the chute's artificial enlargement in 1929 as outcome determinative.[47] The court determined that prior to the enlargement operation

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ered by the water in the Crevasse. *Id.* If oil, gas or other minerals were discovered beneath the beds of the Crevasse, they would belong to plaintiffs, notwithstanding that the water may be navigable or otherwise public. *Id.* at 500. No one disputed that the waters of Lake Beulah were public and anyone who wishes may fish there, subject only to the State of Mississippi's game and fish regulations. *Id.* at 496 (citing State Game & Fish Comm'n v. Louis Fritz Co., 187 Miss. 539, 565-66, 193 So. 9, 12 (1940)). However, there has been a considerable dispute over public access to and use of Beulah Crevasse. *Id.* Over the years, plaintiffs employed a variety of means to exclude the general public to include placing pilings and wire fences across the chute which links the Crevasse to Lake Beulah. *Id.* Plaintiffs also posted the entrance to the Chute and had the hunting club's caretaker deputized. *Id.*

[44] *Id.* at 497. A chute 112 feet wide from treeline to treeline and 192 feet from top bank to top bank runs between Lake Beulah and Beulah Crevasse. *Id.* at 494. Water in this chute is ten feet deep six to eight months a year. *Id.* West of the southwestern end of the oxbow a drain traverses two miles connecting Lake Beulah to the Mississippi River. *Id.* Small boats may pass from the River to Lake Beulah and back again at some river stages. *Id.* In the spring of 1983, Jimmy and Roger Dycus were caught in the Crevasse and arrested. *Id.* at 496. On April 29, 1983, a Bolivar County jury found Jimmy and Roger not guilty of trespass charges. *Id.*

[45] *Id.* at 497. The chancery court found that the waters of Lake Beulah and the Crevasse are ponded waters and that the Crevasse has no natural flow. *Id.* Lake Beulah, the Crevasse and the chute that connects them have sufficient depth, width, and length for more than thirty consecutive days in the year for the floating, but not navigation, of a steam boat with a carrying capacity of two hundred bales of cotton. *Id.*

[46] *Id.* at 502. The court noted that if the Crevasse and the chute had been entirely made by man, title thereto and the right to exclude others from the surface would reside with the owners of record. *Id.* Conversely, if the Crevasse and chute had always been in the same condition as they currently existed as the result of the force of nature, there would be no question that they would be public waterways. *Id.* at 503.

[47] *Id.* at 503. The chancery court made extensive findings as to the non-navigability of the chute, but did not tie those findings to any particular point in time. *Id.* After reviewing the evidence in the record, the supreme court concluded that immediately prior to the 1929 dredging operation, which enlarged the chute connecting the Lake and the Crevasse, Lake Beulah and Beulah Crevasse were separate bodies of water. *Id* at 503-

Lake Beulah and Beulah Crevasse were separate bodies of water and the current navigability of the chute was directly attributable to the 1929 dredging operation, and artificial source.[48]

In *Ryals v. Pigott*,[49] the Mississippi Supreme Court held that the "navigability-in-fact" test for public waters is not limited to use by large commercial vessels, but includes use by commercial fisherman, floatation of logs, and use by pleasure boaters in commercially rented crafts.[50]

Darrell and Allen Ryals do business as a partnership known as Ryals Rentals,[51] Jimmy Barrett is a sole proprietor doing business under the name of Bogue Chitto Choo Choo.[52] Both businesses rent canoes and tubes to members of the public for float trips on the Bogue Chitto River.[53] Charles Pigott, Otis House, Glen Crawford, and Julius O'Quinn, Jr., are riparian landowners along the Bogue Chitto River.[54] Duane Dillon was the sheriff of Pike County in 1987.[55] In June 1987, the Ryals and Barrett feared that the landowners and Sheriff Dillon planned to close the Bogue Chitto River to those who floated the river in canoes or tubes.[56] The Ryals and Barret filed suit in Pike County Chancery Court alleging a conspiracy by the landowners and the sheriff to interfere with their businesses and demanding declaratory, injunctive, and monetary relief.[57] After trial, the chancellor held there was no evidence of a conspiracy to damage the plaintiffs.[58] The chancellor also found that the Bogue Chitto River was not navigable in fact.[59] The

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[48] *Id.* at 504.

[49] No. 07-59531 (Miss. Nov. 28, 1990).

[50] *Ryals*, No. 07-59531, slip op. at 19, 27.

[51] *Id.* at 1.

[52] *Id.*

[53] *Id.* at 2. Ryals Rentals and Bogue Chitto Choo Choo have their principal offices near the banks of the Bogue Chitto River. *Id.* at 1. The Bogue Chitto River flows through at least three counties in South Mississippi. *Id.* at 4. It has its source in Lincoln County just south of Brookhaven and flows southeasterly through Pike and Walthall Counties and into the State of Louisiana where it flows into the Pearl River, which in turn flows into the Gulf of Mexico. *Id.*

[54] *Id.* at 2.

[55] *Id.*

[56] *Id.* at 2-3.

[57] *Id.*

[58] *Id.* at 26. The chancellor stated, "[t]he gravamen of this ultimate finding is the Court's view that no one asked Sheriff Dillon to do anything other than 'enforce the law' and that there was no evidence of anyone 'blocking . . . the river or [of an] arrest being made as a result.' " *Id.*

[59] *Id.* at 3.

chancellor further held that the river was not a public waterway within the definitions of Mississippi Code Annotated sections 1-3-31, 51-1-3, or 51-1-4 (1972).[60] The chancellor also noted that even if the river was a public waterway under section 51-1-4, that section violated Mississippi Constitution article III, sections 14, 17 (1890), as the statute amounted to an unconstitutional taking when applied to a waterway not navigable in fact.[61] On appeal, the plaintiffs argued that the chancellor erred in holding that the river was not a public waterway and in finding no conspiracy to damage their businesses.[62]

The Mississippi Supreme Court affirmed in part and reversed and rendered in part.[63] The court pointed out that the United States conveyed Mississippi waters to the State of Mississippi in trust for the public under the Equal Footings Doctrine.[64] Further, the Act of Congress authorizing formation of Mississippi as a state provided that "navigable rivers . . . leading . . . into the Gulf of Mexico . . . shall be common highways forever free . . . ."[65] Since the Bogue Chitto flows into the Pearl River which in turn flows into the Gulf, the court found that its status as "public water" was based in federal law.[66] The court held that the chancellor erred in his application of the statutory definition of "public waterway" and that in fact the Bogue Chitto was a public waterway under the statutory definitions found in Mississippi Code Annotated sections 1-3-31, 51-1-3, and 51-1-4 (1972).[67] The court commented that "navigable in fact" has never meant exclusively" navigable in fact by large commercial vessels."[68] The court concluded that the river could be used for commercial fishing and that it satisfied the safe passage of logs test.[69] The court noted that today the customary mode of travel on the Bogue Chitto was not by steamboats in commerce but was instead by small outboard motor boats, fishing boats, canoes, tubes and other pleasure crafts.[70] The court held that the area in dispute along the Bogue Chitto River was a public waterway and that riparian landowners may acquire no rights in the surface or waters other than those they enjoy as members of the general public.[71]

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[60] *Id.*

[61] *Id.* at 3-4.

[62] *Id.* at 4.

[63] *Id.* at 28.

[64] *Id.* at 9. Fishing, both for food and as a livelihood, was prominent among the needs the federal government sought to protect in withholding the waters from private ownership. *Id.*; *see* Cingue Bambini Partnership v. State, 491 So. 2d 508, 511-12 (Miss. 1986) (discussion of Equal Footings Doctrine), aff'd sub nom. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, reh'g den. 486 U.S. 1018 (1988).

[65] *Ryals*, No. 07-59531, slip op. at 10. The court noted that both before and after statehood, travel was not easy and that rivers were a major means of mobility. *Id.* at 9. "We doubt there was a soul who saw the Bogue Chitto susceptible of private ownership for the first century of our existence." *Id.*

[66] *Id.* at 10. The court noted that while the question of delineating the waters and tidelands each state held in trust was ultimately one of federal law, the United States has historically accorded the several states great latitude in implementing and administering that public trust. *Id.* Thus the court examined state law concerning whether the Bogue Chitto was public water. *Id.* at 10-14.

[67] *Id.* at 10. The court concluded that the chancellor had, in interpreting MISS. CODE ANN. § 51-1-4 (1972), erroneously required that the average depth along the thread of the channel be exactly three feet, no more and no less. *Id.* at 11 n.15. The court noted also that § 51-1-4, had since trial been amended to exclude the three foot requirement and to

III. Power of Sale Foreclosure

In *Wansley v. First National Bank of Vicksburg*,[72] the Mississippi Supreme Court held that where a foreclosure sale was conducted in a commercially reasonable manner, the debtor had no legitimate interest served by insisting that the trustee have no prior connection with the secured creditor.[73]

Tom and Julian Wansley are brothers and farmers.[74] The Wansleys were co-tenants of some 4,200 acres of farm land which they farmed independently, half each.[75] The Wansleys had obtained annual crop production loan from First National Bank of Vicksburg.[76] In re-

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require only that a natural flowing stream have a mean annual flow of not less than one hundred cubic feet per second. *Id.* at 11 n.15-16. Evidence introduced at trial showed the river discharged 188 cubic feet per second just above the area in question. *Id.* at 25. The court also noted that the chancery court misread § 51-1-3, but because it too was repealed in 1988 concluded "nothing turns on the point." *Id.* at 11 n.17. The court thus concluded that the legislature has declared statutorily that the Bogue Chitto River is a part of the public waters of the State of Mississippi. *Id* at 13-14.

[68] *Id.* at 16. The court noted that navigable in fact "is and always has been a function of the source and (potential) natural capacities of the waters and the public need therefore, and these have been no more static than life itself." *Id.* at 15.

[69] *Id.* at 19.

[70] *Id.* at 18. "Our founding and still central point is that at statehood the United States vested in all of the people in Mississippi access to those waters which by their natural capabilities could serve public interests and needs." *Id.* at 19. The court concluded that waters are navigable in fact if they are navigable by loggers, fishermen and pleasure boaters. *Id.*

[71] *Id.* at 27. The court affirmed the chancellor's finding that there was no conspiracy against the plaintiffs. *Id.* at 26.

[72] 566 So. 2d 1218 (Miss. 1990).

[73] *Wansley*, 566 So. 2d at 1221.

[74] *Id.* at 1219.

[75] *Id.*

[76] *Id.*

cent years the Wansleys had been unable to repay these loans in full and had renewed their unpaid debts with each new production loan.[77] As the indebtedness mounted, the Bank required additional security, which the Wansley's provided by delivering a deed of trust conveying their interest in their land to John C. Wheeless Jr., as trustee.[78] In 1984, the Wansleys were unable to pay even a substantial portion of what each owed and the Bank declared their debt in default and directed Wheeless to foreclose.[79] The Bank was the lone bidder at the sale and on April 1, 1985, Wheeless executed trustee's deeds and delivered them to the Bank.[80] The Wansleys filed a complaint in chancery court to cancel and set aside the trustee's deeds.[81] The Wansleys argued that the trial court should void the foreclosure because Wheeless was personally and financially interested in the Bank, and hence was not an impartial and disinterested trustee.[82] The Bank counterclaimed seeking to confirm title in the property and seeking entry of deficiency judgments against the Wansleys.[83] The chancery court dismissed the Wansley's complaint, confirmed the Bank's fee simple title to the foreclosed property, and entered deficiency judgments against the Wansleys.[84] In its original opinion, the Mississippi Supreme Court held that the Bank's failure to appoint a disinterested trustee rendered the sales voidable.[85] First National Bank petitioned for reconsideration of that decision.[86]

The Mississippi Supreme Court granted the petition for rehearing, withdrew its earlier opinion, and reinstated and affirmed the judgment of the chancery court.[87] Upon reflection, the court reasoned that the independent trustee rule was unworkable as a practical matter and by its nature not capable of affording the debtor the protections which were the focus of the earlier opinion.[88] The court concluded the independent trustee rule, without more, would little aid the beleaguered debtors.[89] Instead, the court reasoned that the commercial reasonableness of the sale offered a much more workable standard.[90] The court further noted that insistence upon the independence of the trustee could severely limit the utility of the power of sale foreclosure.[91] Finally, the court recognized the legislature as the primary expositor of public policy, respecting the force of an intervening legislative enactment on the disinterested trustee requirement.[92] The court found the Bank's behavior satisfied the objective commercially reasonable standard, notwithstanding the trustee's interest.[93]

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[77] *Id.*

[78] *Id.* On February 25, 1982, Tom Wansley and his wife, Mary Ann, executed and delivered a deed of trust conveying their interest in the land to John C. Wheeless, Jr., as trustee. *Id.* The instrument reflected a conveyance in trust to secure Tom's indebtedness of $620,000.00 to the Bank. *Id.* On April 12, 1983, Julian Wansley and his wife, Mary Francis, executed a like deed of trust conveying their interest in the land to Wheeless, as trustee, to secure Julian's indebtedness of $850,000.00 to the Bank. *Id.* Each deed of trust secured future advances, and each stood as security for the Wansley's farm-related financing through the 1984 crop year. *Id.*

[79] *Id.* On March 29, 1985, Wheeless offered the Whansley's land at public auction. *Id.*

[80] *Id.* The Bank bid $500,000.00 for each brother's interest. *Id.*

[81] *Id.*

[82] *Id.* at 1220. The proof at trial developed that Wheeless was general counsel for the Bank and served on its board of directors. *Id.* Wheeless freely acknowledged that he was one of the Bank's largest shareholders. *Id.* Wheeless had also represented the Wansleys at various times over the years. *Id.*

[83] *Id.* at 1219.

[84] *Id.* at 1220.

[85] *Id.* at 1219.

[86] *Id.*

IV. Sixteenth Section Land

In *Chevron U.S.A., Inc. v. State*,[94] the Mississippi Supreme Court held that where the State had leased sixteenth section land under an oil and gas lease, the lessee may continue to work a producing field beyond the twenty-five year lease limit provided for by section 211 of the Mississippi Constitution but may not explore other non-producing areas.[95]

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[87] *Id.*

[88] *Id.* at 1221. The court's focus was on assuring that the debtor was given credit toward his obligation in an amount fairly reflecting the market value of the collateral, so that the debtor would not be saddled with an inequitable deficiency judgment. *Id.*

[89] *Id.*

[90] *Id.* at 1222.

[91] *Id.* The court noted that lawyers commonly serve as trustees and that few lawyers, particularly in small towns, are sufficiently distant from their banks that they may safely serve as trustee. *Id.* The court noted further that it would be difficult to delineate with clarity how much of a connection could void a sale otherwise held in good faith and for fair value. *Id.* Additionally, third parties checking the land records face a considerable dilemma since the land records will seldom reflect the trustee's interest. *Id.* For these reason, the court concluded that the independent trustee rule would force prudent creditors holding deeds of trust to insist on judicial foreclosure; thus, defeating the primary purpose of the power of sale foreclosure. *Id.*

[92] *Id.* at 1222-23. While this case was pending the legislature spoke directly to this point by enacting, "[A]ny person may be appointed and may perform the duties of the trustee in a deed of trust, and such person shall not be disqualified nor shall the acts of such person be invalid because of the relationship of such person to any other party to the deed of trust." 1990 Miss. Laws. ch. 489, § 1(2) (effective July 1, 1990).

[93] *Wansley*, 566 So. 2d at 1225. The court stated that "[e]very aspect of the sale, including the method, advertising, time, place, and terms must be commercially reasonable." *Id.* The court emphasized that this is an objective standard. *Id.*

[94] No. 07-58036 (Miss. Apr. 4, 1990).

The Jones County Board of Supervisor executed an oil and gas lease to W. H. Potts on February 4, 1957, leasing Section 16, Township 9 North, Range 11 West for oil, gas and mineral development.[96] The lease had a primary term of six years and so long thereafter as oil and gas were produced.[97] Potts assigned the lease to the predecessor corporation of Chevron U.S.A.[98] Annual delay rentals of $643.00 were paid to the Jones County Superintendent of Education for the year 1958, 1959 and 1960.[99] On or about December 12, 1960, Chevron commenced drilling and there has been continuous operation or production on the property since.[100] On July 30, 1984, Chevron filed a bill of complaint in Jones County Chancery Court to confirm and quiet the interest conveyed to Potts under the 1957 oil and gas lease.[101] The defendants' answer and counterclaim pleaded that the lease, under the provisions of section 211 of the Mississippi Constitution, expired on February 4, 1982.[102] The chancellor held that the twenty-five year limitation of section 211 had no application to an oil and gas lease.[103] The chancellor confirmed Chevron's right under the lease to continue their operation to extract oil and gas from the producing reservoir, but denied Chevron's right to pursue other areas and horizons and cancelled the lease as to all non-producing areas.[104] Chevron appealed the Chancellor's cancellation of the lease as to all non-producing areas and horizons.[105] The State cross-appealed contending section 211 did not authorize the extension of the lease beyond twenty-five years and that the chancellor erred in holding section 211 had no application to an oil and gas lease.[106]

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[95] *Chevron*, No. 07-58036, slip op. at 18.

[96] *Id.* at 4.

[97] *Id.*

[98] *Id.* at 5.

[99] *Id.*

[100] *Id.* On or about December 12, 1960, Chevron commenced the drilling of the Board of Supervisors No. 2, Well No. 1 (2-2 Well) on the NW ¼ of the NW ¼ of section sixteen. *Id.* The Board of Supervisors 2-1 Well was completed in February, 1961, as a producing well. *Id.* Since the completion of the Board of Supervisors 2-1 Well, Chevron, or its co-owners, have drilled eight other wells on the leasehold, including one "dry hole." *Id.* There has been continuous operation or production from at least on of the wells on the property, since the completion of the 2-1 Well. *Id.*

[101] *Id.* MISS. CODE ANN. § 11-17-29 (1972), authorizes suits in chancery court to confirm and quiet title. MISS. CODE ANN. § 29-3-103 (Supp. 1984) authorizes lessees to confirm and quiet sixteenth section leases, or extensions thereof, naming as defendant the superintendent of eduction of the district where the lease is created. Chevron named the State of Mississippi and the Jones County Superintendent of Education as defendants. *Chevron*, No. 07-58036, slip op. at 6.

[102] *Chevron*, No. 07-58036, slip op. at 6.

[103] *Id.*

[104] *Id.* at 6-7.

The Mississippi Supreme Court affirmed in part and reversed and remanded in part.[107] The court disagreed that section 211 had absolutely no application to an oil and gas lease.[108] However, the court recognized that to have a certain arbitrary date of termination of an oil and gas lease on a producing reservoir was harmful to both lessee and lessor.[109] Therefore, the court held that Chevron had a lawful right to continue their production from the proven reservoir or field so long as they could continuously do so in accordance with the terms of the lease.[110] The court also held that under section 211, twenty-five years was the maximum period that a lessee could possess the *surface* (emphasis added).[111] Therefore, while Chevron has the right to continue producing under the terms of the lease, they are required to compensate the school district by a reasonable annual rental.[112] The court reversed and remanded for the limited purpose of the chancery court framing a decree which will permit Chevron to continue possessing and using the surface necessary for their operations by paying an annual rental to the district.[113] The court affirmed the portion of the decision limiting Chevron to currently producing horizons and held the lease had expired as to all areas except those current producing horizons.[114]

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[105] *Id.* at 7.

[106] *Id.* at 7-8.

[107] *Id.* at 19.

[108] *Id.* at 16. Title to sixteenth section land is in the state, but as trustee for the use and benefit of the schools in the township wherein the land is situated. *Id.* at 9. In recognition of this obligation, the Framers adopted § 211 into the Constitution of 1890. *Id.* The prohibition in § 211 against the sale of sixteen section lands was likewise a recognition by the Framers that the best way to fulfill the purpose of the original trust was for title to remain in the state. *Id.* at 10. The original § 211 prohibited the sale of sixteenth section lands, and limited leasing to a maximum period of twenty five years. *Id.* at 9. Section 211 was amended in 1944 to authorize leases of sixteenth section land within a municipality for a maximum period of 99 years for a gross sum. *Id.* As to land outside the corporate limits of a municipality the amended § 211 limits the maximum lease period to twenty five years. *Id.* The court noted that there can be little doubt that the purpose for reserving sixteenth section land was to derive income from them. *Id.* at 10. The rights conveyed to a grantee under an oil and gas lease are that of a determinable fee. *Id.* at 15; *see also* Stokely v. State, 149 Miss. 435, 446-47, 115 So. 563, 566 (1928) (rights conveyed under oil and gas lease are determinable fee); Dougherty v. Greene, 218 Miss. 250, 258, 67 So. 2d 297, 300 (1953) (same). The constitutional validity under § 211 of legislative enactments authorizing oil and gas leases of sixteenth section land was upheld in Pace v. State, 191 Miss. 780, 809, 4 So. 2d 270, 278-79 (1941).

[109] *Chevron*, No. 07-58036, slip op. at 17. The court noted that such a requirement could promote waste and inefficiency. *Id.* Additionally, it could violate the implied covenants of the lessee to operate with reasonable care and to use successful modern methods of production and development. *Id.*

[110] *Id.*

[111] *Id.*

V. ANNEXATION

In *Magnolia Marine Transport Co. v. City of Vicksburg*,[115] the Mississippi Supreme Court held that Mississippi law clearly empowers a chancery court sitting in an annexation confirmation proceeding to confirm the annexation of an area less than the entire area the municipality seeks to annex.[116]

On October 7, 1985, the Mayor and Board of Aldermen of the City of Vicksburg adopted an annexation ordinance finding that the public convenience and necessity required enlargement of the corporate limits of the city by some 68.4 square miles and ordering the annexation thereof.[117] The Chancery Court of Warren County confirmed the annexation, but only to the extent of 31.7 square miles.[118] The smaller area confirmed was entirely within the original 68.4 square miles described in the original annexation order.[119] Residents within the annexed area complained that the court was without the authority to approve the annexation of the lesser area on the grounds that the city never made a legislative determination that the public convenience and necessity required such a lesser annexation.[120]

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[112] *Id.* at 17-18.

[113] *Id.* at 18.

[114] *Id.* Justice Sullivan, concurring in part and dissenting in part, concluded the majority was wrong in allowing equitable economic principles to override constitutional reality. Chevron U.S.A., Inc. v. State, No. 07-58036, slip op. at 12 (Apr. 4, 1990) (Sullivan, J., concurring in part and dissenting in part). Justice Blass, dissenting, concluded that § 211 did not apply to mineral leases and that the lease was still valid in all respects. Chevron U.S.A., Inc. v. State, No. 07-58036, slip op. at 19-20 (Apr. 4, 1990) (Blass, J., dissenting).

[115] 560 So. 2d 713 (Miss. 1990)

[116] *Magnolia*, 560 So. 2d at 714.

[117] *Id.* Throughout the proceedings in the chancery court, the City argued the entire annexation should be confirmed; however, in the alternative, the City urged the court to confirm annexation of a lesser area. *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

The Mississippi Supreme Court affirmed, holding that the chancery court had carefully and meticulously considered each of the indicia of reasonableness and applied the correct legal criteria in finding the annexation reasonable.[121] The court stated that Mississippi law clearly empowers a chancery court sitting in an annexation confirmation proceeding to confirm the annexation of an area less than the entire area the municipality seeks to annex.[122] The court noted that while there was certainly evidence in contrast, the court would not reverse unless the chancellor was "manifestly wrong or without the support of substantial, credible evidence."[123]

James T. McColgan

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[121] *Id.* at 716.

[122] *Id.* at 714. Justice Sullivan joined by Justices Hawkins and Dan Lee, dissented and concluded that the "reasonableness" standard employed by the majority was too illusive to be of any practical use. *Id.* at 716-17. (Sullivan, J., dissenting).

[123] *Id.* at 716.

TORTS

INTRODUCTION

In 1990, the Mississippi Supreme Court rendered numerous tort-related decisions. This review will focus on those decisions relating to duty of care,[1] statute of limitations,[2] and immunity.[3] The court rendered other decisions relating to legal standards,[4] damages,[5] libel,[6] negligent misrepresentation,[7] direct actions,[8] and jury questions.[9] These cases did not expand or modify the current state of the law in Mississippi, and will therefore not be discussed textually.

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[1] Spears v. Mississippi Power & Light, Co., 562 So. 2d 107 (Miss. 1990) (duty of easement owner to avoid creating an unreasonable risk of harm to users of property); McGovern v. Scarbrough, 566 So. 2d 1225 (Miss. 1990) (business owner not liable for injury to invitee where dangerous condition is in plain view); City of Jackson v. Ball, 562 So. 2d 1267 (Miss. 1990) (knowledge of contractor of dangers associated with project is imputed to contractor's employees and relieves city of liability for failure to warn employee); Willard v. City of Vicksburg, 571 So. 2d 972 (Miss. 1990) (where pre-existing duty to aid exists, immunity under Good Samaritan Statute is not available); Beamon v. Helton, 573 So. 2d 776 (Miss. 1990) (where a doctor is hired by third party to examine patient, no patient-physician relationship exists and doctor's only duty to inform is owed to third party); Foster v. Bass, No. 07-58991 (Miss. Dec. 19, 1991) (adoption agency may rely on information supplied by examining doctors to fulfill its duty to inform adopting parents of child's medical condition).

[2] Shutze v. Pace, 557 So. 2d 776 (Miss. 1990) (where new information is discovered, statute of limitations is only tolled if new information will help to prove plaintiff's case); Owens-Illinois, Inc. v. Edwards, 573 So. 2d 704 (Miss. 1990) (common law "discovery" rule for determining when cause of action arose was codified in amended Miss. Code Ann. § 15-1-49 (Supp. 1990); City of Mound Bayou v. Johnson, 562 So. 2d 1212 (Miss. 1990) (Miss. Code Ann. § 15-1-35 one year limitation period is applicable to torts of false arrest and malicious prosecution).

[3] Sykes v. Grantham, 567 So. 2d 200 (Miss. 1990) (sovereign immunity is available to individual public officials performing ministerial duties and acting without malice); Loyacono v. Ellis, 571 So. 2d 237 (Miss. 1990) (Mississippi recognizes that judges are immune from civil liability for judicial conduct).

[4] James v. Mabus, 574 So. 2d 596 (Miss. 1990) (where testimony is contradictory, directed verdict or judgment notwithstanding the verdict is improper); Kelley v. Frederic, 573 So. 2d 1385 (Miss. 1990) (doctor's testimony in deposition is sufficient to serve as expert opinion to avoid summary judgment); Stubblefield v. Walker, 566 So. 2d 709 (Miss. 1990) (jury verdict may only be overturned where egregious errors of law are found); Cummins v. Century 21 Action Realty, 563 So. 2d 1382 (Miss. 1990) (absent clause of discretion denial of motion for new trial will not be overturned); McMillan v. King, 557 So. 2d 519 (Miss. 1990) (denial of motion for partial judgment notwithstanding verdict should be examined by viewing evidence in relation to jury instructions and determining whether jurors could have differing opinions).

[5] Strickland v. Rossini, No. 07-59266 (Miss. Dec. 12, 1990) (where jury instructions did not require finding of wilful or malicious behavior, recovery of punitive damages are not allowed); Jones v. Shaffer, 573 So. 2d 740 (Miss. 1990) (where jury verdict does not

I. Duty of Care

In *Spears v. Mississippi Power & Light Co.*,[10] the Mississippi Supreme Court held that a utility company that placed a utility pole in the center of a frequently used parking lot had a duty to avoid an unreasonable risk of harm to users of the lot.[11] In *Spears*, the plaintiff, a tractor-tailor driver, ran into a utility pole placed in the center of an all-night parking lot.[12] The accident occurred on a rainy night and the plaintiff alleged he could not see the pole because of inadequate lighting.[13] The pole fell on the cab of the plaintiff's truck and injured him.[14] The court imposed a duty on the utility company because the company knew that the parking lot was heavily used and that the location of the

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reflect uncontradicted proof of damages, new trial will be granted); Purina Mills, Inc. v. Moak, No. 07-59304 (Miss. Dec. 19, 1990) (where damages were identified as gross loss instead of net loss, jury could reasonably estimate total amount of loss); Stephens v. Brock, 568 So. 2d 702 (Miss. 1990) (where party fails to offer evidence of operating expenses, jury cannot speculate as to amount); McCann v. Gulf Nat'l Life Ins. Co., 574 So. 2d 654 (Miss. 1990) (punitive damages not allowed where denial of claim under insurance policy is not independent tort).

[6] Young v. Jackson, 572 So. 2d 378 (Miss. 1990) (where employer discloses private fact about employee to other employees in order to allay fears of job-related dangers, the employer is immune from liability); Lawrence v. Evans, 573 So. 2d 695 (Miss. 1990) (alleged defamatory words must be read in context of entire statement or suit will be dismissed where court must struggle to determine whether words were defamatory).

[7] Bank of Shaw v. Posey, 573 So. 2d 1355 (Miss. 1990) (promise of future conduct will not support recovery for negligent misrepresentation).

[8] Hunt v. Preferred Risk Mut. Ins. Co., 568 So. 2d 253 (Miss. 1990) (no right of direct action in Mississippi; there must be assignment or privity of contract in order to have standing to sue for damages claimed by another).

[9] Shutes v. Platte Chem. Co., 564 So. 2d 1382 (Miss. 1990) (where evidence is sufficient to allow jury to draw reasonable conclusion, case should go to jury for determination); Benjamin v. Hooper Elec. Supply Co., 568 So. 2d 1182 (Miss. 1990) (in action for malicious prosecution, issue of proximate cause is for jury to decide); Rester v. Lott, 566 So. 2d 1266 (Miss. 1990) (where all jury instructions read together state both parties' versions of tort and applicable law, case cannot be reversed because one instruction was favorable to only one party).

[10] 562 So. 2d 107 (Miss. 1990).

[11] *Spears*, 562 So. 2d at 108. The parking lot was situated at a truck stop in Senatobia, Mississippi. *Id.* at 107.

[12] *Id.*

[13] *Id.*

[14] *Id.*

pole required vehicles to maneuver around it.[15] Additionally, the parking lot was used during all hours of the day and night.[16] The circuit court directed a verdict in favor of the utility company based upon its determination that the plaintiff was a trespasser or a licensee with respect to the utility company.[17] The issue before the Mississippi Supreme Court was what duty did the utility company owe to users of the lot.[18] The court held that because the utility company owned an easement upon which the pole was located, the company owed the same duty that any property owner owed, "to avoid creating an unreasonable risk of harm to another."[19] The court reversed the circuit court's ruling and remanded the case for a new trial.[20]

The Mississippi Supreme Court reaffirmed its opinion that a business owner is not an insurer of safety in *McGovern v. Scarborough*.[21] In *McGovern*, an invitee[22] was injured when he tripped on the threshold of a door and fell.[23] The court affirmed the circuit court's ruling that the duty to warn existed only where the danger was not "in plain and open view."[24] The court held that since the threshold was not hidden,[25] the business owner owed no duty to warn an invitee of the danger of tripping on the threshold.[26]

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[15] *Id.* The court determined that the plaintiff, driving his vehicle in the parking lot, was not a trespasser, nor a licensee. *Id.* The utility company, therefore, owed a greater duty to the plaintiff than that of refraining from wilfully and wantonly injuring him. *Id.* The court reasoned that since the utility company had an easement that ran through the parking lot, the company was a property owner. *Id.* In light of its status as a property owner, the company owed a duty to "avoid creating an unreasoanble risk of harm." *Id.* The company placed a black pole in the center of the parking lot which was paved with black asphalt, and failed to place guard rails around or reflectors on the pole. *Id.*

[16] *Id.* at 107.

[17] *Id.*

[18] *Id.* at 108.

[19] *Id.*

[20] *Id.* at 109. The court stated that the issue as to whether the utility company breached its duty was a question for the jury. *Id.*

[21] 566 So. 2d 1225 (Miss. 1990).

[22] *McGovern*, 566 So. 2d at 1226. Plaintiff, McGovern, was at defendant's place of business in order to assist defendant with his inventory. *Id.* McGovern had been to defendant's business before but had not been there in "quite a while." *Id.*

[23] *Id.* The plaintiff tripped on the front door's threshold, fell, and injured his back. *Id.*

[24] *Id.* at 1228. Pictures produced at trial showed that the threshold cover was a different color than the floor and the door. *Id.* at 1226. The court concluded that the doorway in question presented no different danger than any other doorway presented. *Id.* at 1228.

[25] *Id.* The court upheld the circuit court's opinion that the threshold was open and obvious. *Id.*

On the converse, in *City of Jackson v. Ball*,[27] the Mississippi Supreme Court held that the city owed a duty to warn a contractor of the latent danger involved when sterilizing a water line with chlorine gas.[28] However, the court noted that once the contractor had actual knowledge of the danger,[29] the city owed no duty to warn the contractor's employees.[30] The court held the failure of the city to warn an employee of the contractor who had knowledge of the danger was not the proximate cause of the employee's injury, and therefore was not an actionable omission.[31]

The Good Samaritan Statute[32] was discussed in *Willard v. City of Vicksburg*[33] and the court invited the legislature to amend the statute to include a provision that the statute is not available as a defense to a party who had a pre-existing duty to offer assistance.[34] In *Willard*, the plaintiff charged that the city breached its duty to give prompt emergency assistance and that the breach was a proximate cause of decedent's death.[35] The city sought protection under the Good Samaritan Statute and moved for summary judgment.[36] The circuit court granted the city's motion.[37] On appeal, the Mississippi Supreme Court held that since the city had a pre-existing duty to extend emergency aid, it would not be allowed to seek protection under the Good Samaritan Statute.[38] The court recalled that the policy reason behind the statute was to encourage bystanders to offer assistance in emergencies.[39] Furthermore, if the bystander offered some assistance, he invoked a duty upon himself to act in good faith and use due care.[40] Finally, the court noted that to offer a defendant, who already had a duty to act, protection from liability under the Good Samaritan Statutes would offend the underlying policies of the statute.[41] However, the court declined to interpret the Good Samaritan Statute while strongly encouraging the legislature to modify the statute.[42] The supreme court reversed and remanded the case for a determination of whether the city satisfied the reasonableness standard of care.[43]

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[26] *Id.* The lower court had determined that the plaintiff's negligence was the sole proximate cause of his injuries. *Id.* at 1226. The supreme court refused to make property owners "insurers of invitees' safety." *Id.* at 1228.

[27] 562 So. 2d 1267 (Miss. 1990).

[28] *City of Jackson*, 562 So. 2d at 1270. The plaintiff, Ball, was employed by Kay Engineering as an apprentice plumber. *Id.* at 1268. Kay Engineering had been hired as a contractor to connect a private business' facilities with the city's water main. *Id.* Once Kay Engineering completed its line, it contacted the city to sterilize the new line. *Id.* The procedure for sterilization involved injuecting chlorine gas into the line filled with water. *Id.* The latent danger involved with this process is the possibility of chlorine gas poisoning. *Id.* This possibility would only occur where an air pocket is left in the water line before the gas is added. *Id.* When the gas reaches the air pocket, it will burst from any opening. *Id.* The Mississippi Supreme Court held that the city owed a duty to warn the contractor of any hazards. *Id.* at 1270. The court found that Kay Engineering had knowledge of the dangers involved. *Id.* Therefore, the city had no further duty to warn. *Id.*

[29] *Id.* at 1270. Stingley, Kay Engineering's Supervisor, had special training in sterilization of water lines and new the dangers associated with air bubbles in the line. *Id.* at 1270-71. Stingley's knowledge absolved the city's duty to specifically warn any of Kay's employees. *Id.* at 1271.

[30] *Id.* The court reasoned that "once the contractor [Kay Engineering] knows of the danger, the city's failure to warn may not be said [to be] the *proximate* cause of contractor's worker's injury." *Id.* at 1270 (emphasis in original).

[31] *Id.* The supreme court reversed the circuit court's ruling that the city owed a duty to warn an employee of a contractor of latent dangers. *Id.*

[32] MISS. CODE ANN. § 73-25-37 (Supp. 1988).

[33] 571 So. 2d 972 (Miss. 1990).

[34] *Willard*, 571 So. 2d at 975. The city owned and operated an ambulance service. *Id.* at 973. Therefore, the city, upon notification of an accident, had a pre-existing duty to render emergency care and transportation. *Id.*

In *Beaman v. Helton*,[44] the court held that a physician's duty to examinee, where no physician-patient relationship had been established, was to be determined by requirements imposed on the physician by the contracting third party. In *Beaman*, the deceased, Helton, was examined by the defendant doctor at the request of the Social Security Administration, Disability Determination Service (DDS).[45] The doctor, after reviewing x-rays taken of Helton, discovered a malignancy.[46] Instead of contacting Helton, the doctor contacted the DDS, informed them of the malignancy and encouraged them to contact Helton.[47] DDS did not notify Helton,[48] and two months later, Helton was diagnosed by another physician and later died.[49] In the medical malpractice action brought by Helton and his wife, the doctor moved for summary judgment based on lack of the requirement of a physician-patient relationship.[50] The circuit court denied the doctor's motion.[51] On interlocutory appeal, the Mississippi Supreme Court held that a physician-patient relationship must be proven in order to establish a prima facie case of medical malpractice.[52] The doctor was given a DDS manual which was supplied to all DDS examining physicians.[53] In this manual, the examining physician was instructed to inform DDS if any life-threatening condition was discovered and DDS would notify a physician for treating the patient.[54] The court reasoned that since no physician-patient relationship was proven and the doctor followed the procedure set out in the manual, he "discharged his duty to the examinee."[55] In his dissent, Justice Sullivan urged the majority to adopt a rule that an examination requested by a third party created a physician-patient relationship.[56]

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[35] *Id.* Plaintiff's decedent was seriously injured in an automobile accident east of Vicksburg. *Id.* Testimony was that it took the ambulance over 20 minutes to reach the accident scene from the time the emergency call was placed. *Id.* at 974. Two experts testified that amount of time was excessive. *Id.* Although the plaintiff's decedent survived the accident, he suffered from Lance-Adams Syndrome, a condition caused from "sustained low blood flow and low oxygen to the brain." *Id.* Plaintiff's decedent was bound to a wheelchair and suffered diminished mental capacity. *Id.* Approximately 3 years later, plaintiff's decedent committed suicide. *Id.* at 973.

[36] *Id.*

[37] *Id.* at 974. The circuit court based its grant of summary judgment on *Lewis v. Soriano*, 374 So. 2d 829 (Miss. 1979) which stated in dicta that according to MISS. CODE ANN. § 73-25-37, in emergency situations, physicians are immune from civil liability for emergency care rendered. *Willard*, 571 So. 2d at 973.

[38] *Willard*, 571 So. 2d at 975. The supreme court determined that the issue at hand was one of standard of care. *Id.* The court, therefore, refused to interpret the statute. *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] 573 So. 2d 776 (Miss. 1990).

[45] *Beaman*, 573 So. 2d at 777. The physician was not paid nor chosen by the patient,

The duty of medical evaluation owed to adoptive parents by the adoption agency was determined in *Foster v. Bass*.[57] The Mississippi Supreme Court held that an adoption agency fulfilled its duty to inform adoptive parents of the medical condition of the adopted child

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Helton. *Id.*

[46] *Id.* In order for Mr. Helton to receive social security benefits, he was required by DDS to be examined by Dr. Beaman. *Id.*

[47] *Id.* Helton had already left the doctor's office. *Id.*

[48] *Id.* This was the procedure required to be followed by DDS and was set out in the handbook distributed by DDS to its examining physicians. *Id.* at 778.

[49] *Id.* at 777. However, Helton was denied the social security benefits requested. *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 778.

[53] *Id.* The doctor was retained by DDS as one of their examining physicians. *Id.*

[54] *Id.* The manual provided that Dr. Beaman could advise the examiner to seek "additional diagnostic studies" if the examiner is "still in your office." *Id.*

[55] *Id.* Since the court found it clear that Dr. Beamon had breached no duty to the deceased, summary judgment should have been awarded in favor of the defendant. *Id.* at 778.

[56] *Id.* at 779 (Sullivan J. dissenting). In addition, Justice Sullivan stated that a doctor has a common law duty "to act as a reasonable and prudent person under the circumstances." *Id.* at 782. Lastly, the doctor owed a duty to disclose. *Id.* at 783.

[57] No. 07-58991 (Miss. Dec. 19, 1990).

when the agency gave the adoptive parents all of the information the agency had concerning the medical evaluations of the child.[58] The court held that the agency was allowed to rely on information supplied to it by examining doctors.[59] Since the agency "did not engage in misrepresentation or fraud" it did not breach its duty to inform.[60]

II. Statute of Limitations

In *Shutze v. Pace*,[61] the Mississippi Supreme Court affirmed the lower court's ruling that the discovery of new information will not revive a cause of action which was otherwise time-barred.[62] *Shutz* was a medical malpractice suit wherein the decedent had suffered serious brain damage on two separate occasions.[63] On September 25, 1986, the survivors filed a wrongful death claim against the surgeon, Dr. Pace.[64] This claim was predicated on the discovery that one of the hospital forms had been improperly changed.[65] The plaintiffs submitted that this deviation from medical norms somehow justified a negligence claim against Dr. Pace.[66] The Mississippi Supreme Court disagreed and instead emphasized that medical malpractice claims must be brought "within two (2) years from the date of the alleged act, omission or neglect or with reasonable diligence might have been first known or discovered."[67] The court further reasoned that the plaintiffs were apprised of all the necessary facts and the new information on changes in the operative records was not so material as to justify a claim against Dr. Pace.[68]

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[58] *Foster*, No. 07-58991, slip op. at 31.

[59] *Id.*

[60] *Id.*

[61] 557 So. 2d 776 (Miss. 1990).

[62] *Shutze*, 557 So. 2d at 779. In dismissing the action, the court relied on the express language of the Code which provides:

> (1) No claim in tort may be brought against a licensed physician, osteopath, dentist, hospital, nurse, pharmacist, podiatrist, optometrist or chiropractor for injuries or wrongful death arising out of the course of medical, surgical or other professional services unless it is filed within two (2) years from the date of the alleged act, omission or neglect or with reasonable diligence might have been first known or discovered.

Id. (quoting Miss. Code Ann. § 15-1-36 (Supp. 1984)).

[63] *Id.* at 777. The decedent first incurred serious damage during surgery when the flow of blood to the brain was interrupted. *Id.* The second incident occurred in the hospital when she was being moved. *Id.*

[64] *Id.* During a previous trial, the suit against Dr. Pace had been dropped following the recommendation of a medical expert that there was no malpractice on the part of Dr. Pace. *Id.* at 778.

[65] *Id.* at 778. Once a medical record is completed, the only ethical and accepted method of making a change is by drawing a line through the information to be changed and inserting the desired changes. *Id.* Instead of following this procedure, the circulating nurse typed a new report. *Id.*

[66] *Id.*

In *Owens-Illinois, Inc. v. Edwards*,[69] the Mississippi Supreme Court addressed the issue of when a cause of action accrues in situations involving latent diseases.[70] From the 1940's to 1984, Charles Edwards, plaintiff-appellee, worked at the Ingalls shipyard in Pascagoula, Mississippi.[71] During this period, he was exposed to asbestos in materials which were manufactured and sold by among others, the Owens-Illinois Company.[72] In 1980, Edwards began experiencing shortness of breath and on August 26, 1986, he was diagnosed with pulmonary asbestosis.[73] On September 29, 1986, he sued, among others, the Owens-Illinois Company under the theories of negligence and strict liability.[74]

In evaluating Edward's claim, the court noted that Mississippi Code Annotated section 15-1-49 (1972) was applicable.[75] That section however does not carry a definition of accrual.[76] Relying on prior decisions, the court noted that "[a] cause of action accrues only when it comes into existence as an enforceable claim; that is, when the right to sue becomes vested."[77] Further, the court emphasized that a "tort is not complete until the injury occurs."[78] But in cases such as Edwards', the court noted that "exposure to asbestosis may have latency periods of thirty years or more."[79] The court reasoned that the "cause of action accrues and the limitations period begins to run when the plaintiff can reasonably be held to have knowledge of the injury or disease.[80] The court concluded that justice would be best served if section 15-1-49 were construed in conjunction with the common law discovery rule.[81] On that basis, the court held that Edwards' claim was within the applicable limitations period.[82]

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[67] *See supra* note 62.

[68] *Shutz*, 557 So. 2d at 779. The court reasoned that the current suit was not for some tortious interference with a prior case. *Id.* Hence, the discovery of the new information was not bound to make any difference in the legal posture of Dr. Pace. *Id.*

[69] 573 So. 2d 704 (Miss. 1990).

[70] *Edwards*, 573 So. 2d at 706. On September 29, 1986, suit was filed in the Circuit Court of Jackson County. *Id.* at 705. In order to determine the point at which the cause of action accrued in cases involving latent diseases, all parties petitioned the trial court for an interlocutory ruling from the Mississippi Supreme Court. *Id.* at 706.

[71] *Id.* at 705.

[72] *Id.*

[73] *Id.* Prior medical tests had not revealed any abnormalities. *Id.*

[74] *Id.* Others included Owens-Corning Fiberglass and Manville Corporation. *Id.*

[75] *Id.* at 706.

[76] *Id.*

[77] *Id.* at 706-07.

[78] *Id.* at 707 (citing *Smith v. Temco, Inc.*, 252 So. 2d 212, 216 (Miss. 1971)).

[79] *Id.*

[80] *Id.* at 709.

In *City of Mound Bayou v. Johnson*,[83] the Mississippi Supreme Court addressed the period of time within which one charging police brutality must sue the offending officer and the municipality the officer serves.[84] The related questions involving the limitation periods for false arrest and malicious prosecution against a municipality were also at issue.[85]

On August 6, 1983, Eddie Johnson Jr., appellee-plaintiff, was arrested in Mound Bayou by Alfred Thompson acting in his official capacity as a police officer.[86] Some two years later, June 7, 1985, Mr. Johnson sued alleging police brutality, false arrest and malicious prosecution.[87] In dismissing the assault and battery complaint, the court held that the one year statute of limitations is applicable to public agencies "to the end that the officials may be about the business of performing their official duties and serving the public without the burden of worries of whether they will be sued for deeds long past."[88]

The one year limitations period prescribed in Mississippi Code

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[81] *Id.* at 708-09. The court noted that there are certain causes of action where the wrongful act and the resulting injury do not occur simultaneously. *Id.* at 708.

[82] *Id.* at 709. The court decided that its conclusion was influenced by three prior decisions. *Id.* at 708; *see* Staheli v. Smith, 548 So. 2d 1299, 1303 (Miss. 1989) (court had determined that accrual of cause of action in defamation cause occurred when plaintiff first discovered that he had been defamed; Ford Motor Co. v. Broadway, 374 So. 2d 206 (Miss. 1979) (court held that special provision will be made where the wrongful act and resulting injury do not occur at same time); Tabor Motor Co. v. Garrard, 233 So. 2d 811 (Miss. 1970) (court concluded that two year statute of limitation should run from date of discovery of injury).

[83] 562 So. 2d 1212 (Miss. 1990).

[84] *Mound Bayou*, 562 So. 2d at 1213.

[85] *Id.* The court noted that Miss. Code Ann. § 15-1-35 (1972) contains eight enumerated torts: (1) assault, (2) assault and battery, (3) maining, (4) false imprisonment, (5) malicious arrest; (6) menace; (7) libel, and (8) all actions for slanderous words. *Mound Bayou*, 562 So. 2d at 1217.

[86] *Mound Bayou*, 562 So. 2d at 1213. The plaintiff alleged that the arresting officer wantonly and negligently beat him with his hands, pistol and blackjack. *Id.* Such force was clearly excessive and plaintiff incurred a wide range of physical discomforts. *Id.*

[87] *Id.* at 1217. The court determined that the action for malicious prosecution accrued on January 31, 1984, when the two misdemeanor prosecutions preferred by Mound Bayou were dismissed by the county court. *Id.* This determination was consistent with prior court decisions. *See* Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725, 728 (Miss. 1989) (action for malicious prosecution accrues on day of judgment).

[88] *Mound Bayou*, 562 So. 2d at 1217.

Annotated section 15-1-35 (1972) was held applicable to actions for false arrest and malicious prosecution.[89] The court reasoned that while neither false arrest nor malicious prosecution were specifically enumerated in section 15-1-35, their close relationship to the eight named torts justified the application of the one year bar.[90] As to the plaintiff's claim that his federally secured civil rights had been violated, the court noted that a prior dismissal with prejudice by a federal court rendered unnecessary the reconsideration of that issue.[91]

In dissent, Justice Hawkins submitted that in "the absence of a Legislative Act granting a right of interlocutory appeal, . . . [the] court has no lawful authority to hear any such appeal."[92]

III. IMMUNITY

A. *Sovereign Immunity*

In *Sykes v. Grantham*,[93] Jimpson, an inmate at Parchman Penitentiary who had a lengthy criminal record was evaluated for parole.[94] There was ample evidence in Jimpson's record to suggest he was a high risk parole candiate.[95] The State Parole Board however, eventually voted to grant parole, and the following year, Jimpson shot and paralysed Linda Grantham.[96] Linda Grantham sued the State Parole Board which resulted in a judgment of $2.5 million in actual damagess and $500,000 in punitive damages.[97] In over-turning this decision, the Mississippi Supreme Court agreed that in voting for Jimpson's parole, the Parole Board had substantially discharged its ministerial duties.[98] The Board had not committed a willful wrong or perpetrated a malicious act.[99] The court suggested that the release of the inmate was clearly a case of poor judgment, but was not synonymous with reckless disregard or perversion of discretionary authority.[100] The court concluded that the Board had not transgressed its legal duties and was shielded by the doctrine of sovereign immunity.[101]

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[89] *See supra* note 85.

[90] *Mound Bayou*, 562 So. 2d at 1219.

[91] *Id.* at 1219-20. The court disposed of this issue by pointing out that since the plaintiff had chosen to let the question fall into desuetude, the Mississippi Supreme Court would not act otherwise. *Id.* at 1220.

[92] *Id.* at 1221-35 (J. Hawkins, dissenting).

[93] 567 So. 2d 200 (Miss. 1990).

[94] *Sykes*, 567 So. 2d at 203-07. The range of crimes with which the prisoner had been charged included robbery, assault and battery with intent to murder, burglary and larceny. *Id.* at 203-04. The prisoner's active criminal record also included the murder of a convenience store clerk. *Id.* at 204. While in prison, the inmate was difficult to get along with and on several occasions, had to be disciplined. *Id.* at 205-07.

[95] *Id.* at 207.

[96] *Id.* at 208. The bullet entered the base of her skull, leaving her a quadriplegic. *Id.*

[97] *Id.*

[98] *Id.* at 211.

B. Judicial Immunity

The proposition that a member of the judiciary is generally immune from civil liability was reiterated in *Loyacono v. Ellis*.[102] In *Loyacono*, Circuit Judge John Edward Ellis appointed Paul Kelly Loyacono to defend one Michael Freeman on charges of capital murder and rape.[103] Loyacono however was reluctant to assume the appointment and on September 3, 1987, filed a motion to set aside the appointment.[104] Judge Ellis denied the motion, and on September 10, 1987, Loyacono filed a motion for reconsideration.[105] Once again, Judge Ellis overruled Loyacono's motion, and Loyacono proceeded to perfect an appeal.[106] On February 22, 1988, Judge Ellis scheduled Freeman's arraignment and ordered Loyacono to appear.[107] When Loyacono failed to appear, Judge Ellis ordered his arrest.[108] Judge Ellis ordered Loyacono jailed indefinitely and, denied Loyacono's written motion for bond and notice of appeal.[109] Loyacono was released the following day on the order of the Mississippi Supreme Court.[110] Loyacono sued Judge Ellis, alleging false arrest, prosecution and imprisonment and denial of due process.[111] Judge Ellis invoked the doctrine of judicial immunity and claimed that he was protected from suit even when his conduct was actuated by "malice or corruption."[112] The Mississippi Supreme Court agreed, stating that "public policy mandates that a judge should have the power to make decision without having to worry about [liability] for his actions."[113] The court noted that such a policy was consonant with "the best interests of the people and public order require that judges be immune from civil liability."[114]

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[99] *Id.* at 212.

[100] *Id.*

[101] *Id.* The court however was critical of the parole system as administered in Mississippi. *Id.*

[102] 571 So. 2d 237 (Miss. 1990).

[103] *Loyacono*, 571 So. 2d at 237.

[104] *Id.* At the hearing on that motion, Judge Ellis allegedly showed animosity toward Loyacono. *Id.* He also acted as witness, judge and attorney. *Id.*

[105] *Id.* at 237-38. Neither at that level, nor at the supreme court did Loyacono file a motion for supersedeas. *Id.*

[106] *Id.* at 238.

[107] *Id.*

[108] *Id.* Loyacono was held at the Warren County Jail. *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

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[113] *Id.* The court noted that there are other remedies for judicial misconduct. *Id.*

[114] *Id.*

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